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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

DAN MORALES, Individually and in his official capacity as Attorney General of the State of Texas,
Petitioner-Defendant,

VS.

TEXAS CATASTROPHE PROPERTY INSURANCE ASSOCIATION, UNION STANDARD INSURANCE COMPANY and HIGHLANDS INSURANCE COMPANY,
Respondents-Plaintiffs.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether a state created entity funded by the coercive power of a state has a due process right under the Fourteenth Amendment to challenge legislation requiring it to be represented by the state's attorney general?

LIST OF PARTIES

1. The Texas Catastrophe Property Insurance Association (CATPOOL), Union Standard Insurance Company, Highlands Insurance Company, respondents-plaintiffs.

2. Republic Insurance Company, former plaintiff.

3. Dan Morales, individually and in his official capacity as Attorney General of the State of Texas, petitioner-defendant.

4. The Office of the Texas Public Insurance Counsel, *amicus curiae* in the trial court.

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No.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

DAN MORALES, Individually and in his official capacity as Attorney General of the State of Texas,
Petitioner-Defendant,

VS.

TEXAS CATASTROPHE PROPERTY INSURANCE ASSOCIATION, UNION STANDARD INSURANCE COMPANY and HIGHLANDS INSURANCE COMPANY,
Respondents-Plaintiffs.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner Dan Morales respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on October 28, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 975 F.2d 1178, and is reprinted in the Appendix, p. A-1, *infra*.

The memorandum order of the United States District Court for the Western District of Texas (Nowlin, D.J.) has not been reported. It is reprinted in the Appendix, p. A-22, *infra*.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. § 1983, respondents brought this suit in the Western District of Texas. On September 30, 1991, the Western District granted respondents' motion for a preliminary injunction.

On petitioner's appeal, the Fifth Circuit on October 28, 1992 affirmed the Western District. A petition for rehearing en banc was denied by the Fifth Circuit on November 30, 1992.

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254.

STATUTE INVOLVED

The Texas Catastrophe Property Insurance Pool Act, Section 12A:

> LEGAL COUNSEL. The association is a state agency for purposes of employing or authorizing legal representation and shall be represented by the attorney general in the manner provided by general law for representation of any other state agency by the attorney general.

Tex. Ins. Code Ann. art. 21.49, § 12A (Vernon Supp. 1992). [1]

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[1]The complete text of the Texas Catastrophe Property Insurance Pool Act as amended is provided in Appendix, p. A-41, *infra*.

STATEMENT OF THE CASE

The Texas Catastrophe Property Insurance Pool Act (the Act), Tex. Ins. Code Ann. art. 21.49 (Vernon 1981 & Supp. 1992), created the Texas Catastrophe Property Association (CATPOOL) to provide windstorm and hail insurance along the Texas coast to protect the economic welfare of Texas and promote orderly growth and development. Tex. Ins. Code Ann. art. 21.49, §1 (Vernon 1981). All property insurers in Texas are compelled by the state to be members of CATPOOL. *Id.*, §4(a) (Vernon 1981). The State Board of Insurance (State Board) approves CATPOOL's plan of operation, establishes the premiums it charges and sets the assessments it levies on members. *Id.*, §§5(b),(c),8(h) (Vernon Supp. 1992). CATPOOL's directors are responsible and accountable to the State Board. *Id.*, §5(g) (Vernon Supp. 1992). If claims exceed premiums and reinsurance, CATPOOL assesses the members with the loss proportionate to their share of the property insurance market in the state. Tex. Ins. Code Ann. art. 21.49, §5(b) (Vernon Supp. 1992). Members receive tax credits if losses exceed $100 million. *Id.*, §19 (Vernon 1981).

The 72nd Legislature of the State of Texas amended the Act to require CATPOOL to be represented by the Attorney General. Tex. Ins. Code Ann. art. 21.49, §12A (Vernon Supp. 1992). That amendment became effective on September 1, 1991. Two days later, CATPOOL filed a Section 1983 Civil Rights lawsuit in the United States District Court for the Western District of Texas alleging Tex. Ins. Code Ann. art. 21.49, §12A violated CATPOOL's due process right to choose its counsel.

The Texas Attorney General answered maintaining that CATPOOL has no due process rights since it is a state entity, created and sustained by Texas' coercive power. A preliminary injunction hearing was held on September 18, 1991. The

district court concluded CATPOOL was not a state agency and, therefore, had constitutional rights. In pertinent part, the District Court held:

> The mere fact that Section 12A asserts that [CATPOOL] is a "state agency for the purposes of employing or authorizing legal representation" does not convince the Court that the association is in fact a state agency without Fifth Amendment rights. As stated at length in the findings of fact, [CATPOOL] receives no public funds, and its losses are paid out of the private funds of its member companies. The member companies do not receive any profits for providing the catastrophe insurance to the 14 coastal counties. Any premiums collected in excess of losses for the year are used to purchase reinsurance.

Appendix, p. A-33. Based on this characterization of CATPOOL's funds, the District Court held CATPOOL was not a state agency and on September 30, 1991, an order was entered restraining Dan Morales, individually and in his official capacity as Attorney General of the State of Texas, from enforcing section 12A of the Texas Insurance Code art. 21.49. Appendix, p. A-39. That same day, petitioner filed his Notice of Appeal.

The basis of jurisdiction in the Court of Appeals was 28 U.S.C. § 1292(a)(1). The Fifth Circuit decided that CATPOOL was not a part of the state and affirmed the district court, holding:

> The central question in this § 1983 suit is whether any federally guaranteed right of CATPOOL has been violated. The attorney general, apparently not disputing that a right to retained counsel in civil matters generally exists, argues that CATPOOL is a state agency and therefore has no constitutional rights to assert against the

> state which created it, and which could destroy it if the legislature decided to do so. We conclude that there is a constitutionally guaranteed right to retain hired counsel in civil matters, that the right in this case is grounded in the Fourteenth Amendment due process clause, and that CATPOOL holds such a right.

Appendix, p. A-4. Although the Court acknowledged CATPOOL exists because of the coercive power of Texas, the Court, like the District Court, decided CATPOOL is not a part of the state because its funds are private money. Appendix, p. A-10. Judge Parker dissented, finding that CATPOOL was a part of the state. The dissent concluded CATPOOL's funds are public because they are "raised through the State's coercive power for public purposes." Dissent, Appendix, p. A-19. The characterization of CATPOOL's funds is thus the dispositive issue.

REASONS FOR GRANTING THE WRIT

A. The Question Presented is of Exceptional Importance To the State of Texas and Involves a Fundamental Principle of Federalism

The issue goes to the heart of "our country's constitutional scheme of federalism." (Dissent, Appendix, p. A-21.) The Texas Legislature intended that CATPOOL be a part of the state and use the professional services of the Attorney General. Tex. Ins. Code Ann. art. 21.49, §12A (Vernon Supp. 1992). The Legislature of the State of Texas explicitly determined that CATPOOL was an agency of the state. The Fifth Circuit rejected Texas' characterization of its own creation. In the first instance, the characterization of a state created entity should rest with the state and its courts. Here, the Fifth Circuit has substituted its judgment for that of

the Texas legislature and courts. The Fifth Circuit will likely not review its judgment on appeal of a permanent injunction order and it is, accordingly, appropriate for this Court to consider this petition for review of a preliminary injunction order. Moreover, though not expressly holding the statutory provision involved unconstitutional, the effect of finding that CATPOOL is not a part of the state is to grant CATPOOL standing to raise a constitutional right to retained counsel that renders enforcement of the provision unconstitutional.

The analysis relied on by the Fifth Circuit rests on the notion that because members of CATPOOL have some control over CATPOOL, private monies are at stake and, therefore, CATPOOL should be allowed to chose its own attorney. In explaining this conclusion, the Fifth Circuit posited a hypothetical state entity that it would consider part of the state. The distinguishing characteristic of that hypothetical entity was that it would be controlled exclusively through the State Board; private members of the association would have no voice in its operation. Texas chose not to create CATPOOL in this manner, but will now be forced to reassess CATPOOL's structure in order for the Fifth Circuit to allow Texas to control its own creation.

The Fifth Circuit decision impacts not only Texas' ability to control CATPOOL, but other agencies of the state as well. In particular, the 72nd Legislature imposed an identical requirement to use the Attorney General for legal representation on another state entity similar to CATPOOL, the Texas Workers' Compensation Insurance Facility (Facility). Tex. Ins. Code Ann. art. 5.76-2, §2.05(j) (Vernon Supp. 1992). In addition, Texas has created a number of other entities whose membership is coerced, but where involuntary members have a voice in the entity's operation. Texas has always considered these entities to be a part of the state, but the Fifth Circuit's ruling brings the status of all of these state creations into question. How Texas must structure its creations in the future,

or change their current structure to accomplish its goals, is of fundamental importance to Texas. This petition presents an issue basic to federal-state relations that warrants consideration by the Supreme Court.

B. The Fifth Circuit's Decision is Contrary to Prior Rulings of the Supreme Court

As noted by the panel majority "if CATPOOL be a part of the state, it cannot make any constitutional claims against the state." Appendix p. A-7. This Court has repeatedly acknowledged this fundamental federalist principle. *See, e.g., Williams v. Mayor and City Counsel of Baltimore*, 289 U.S. 36, 40, 53 S. Ct. 431, 432, 77 L.Ed 1015 (1933); *City of Trenton v. State of New Jersey*, 262 U.S. 182, 43 S. Ct. 534, 67 L.Ed. 937 (1923). This precept of federalism traces to Chief Justice Marshall's opinion in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat) 518, 629-30, 4 L.Ed 629, 657 (1819):

> [T]he framers of the constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and the instrument they have given us is not to be so construed...If the act...be a grant of political power, if it created a civil institution to be employed in the administration of government, or if the funds...be public property, or if the state..., as a government, be alone interested in its transactions, the subject is one which the legislature of the state may act according to its own judgment, unrestrained by any limitations of its power imposed by the constitution of the United States.

With this principle of federalism in mind, an examination of the characteristics of CATPOOL leads to the conclusion that it is indeed a part of the State of Texas, not merely a "group of private insurers protecting their private pocketbooks." (Dissent, Appendix p. A-12.)

State law controls a determination of the characteristics of a state entity. *Board of Levee Comm'rs of the Orleans Levee Board v. Huls*, 852 F.2d 140, 142-143 (5th Cir. 1988). Texas courts have not addressed the precise issue of whether CATPOOL is "a part of the state," but an analogous case, *McGregor v. Clawson*, 506 S.W.2d 922 (Tex. Civ. App.—Waco 1974, original proceeding), is indistinguishable. In *McGregor*, the court held that the State Bar is a state entity because it:

> exist[s] solely by virtue of the exercise of the power of the State acting through its legislative department...[and]...the Legislature could at any time terminate their existence... They (the State Bar and its Grievance Committees) are creatures of the State... [and have] no priviliges, immunities, or rights under the State and Federal Constitutions which it may invoke in opposition to the will of its creator.

Id. at 929.

Like the State Bar, CATPOOL exists only because of the state's coercive power. The Bar's membership, like CATPOOL's, is involuntary. Both the State Bar and CATPOOL are funded by involuntary assessments on their members. The Bar's Grievance Committee, like CATPOOL, performs delegated administrative functions for the state. Even though the State Bar does not receive funds from the treasury, the Texas Supreme Court held the State Bar is a state entity

with no due process rights to a fair trial. *Id.* Similarly, though not funded by the treasury, CATPOOL's assessments are coerced by the state. Accordingly, under *McGregor*, CATPOOL is a state entity with no due process rights to choose its counsel in contravention of the Legislature's wishes.

Moreover, the characteristics of CATPOOL that Texas courts have addressed demonstrate further that CATPOOL is a part of the state. CATPOOL was created by the state for a specific public purpose, to protect Texans and promote economic growth in coastal regions that insurance companies refused to insure. *Texas Catastrophe Prop. Ins. Ass'n v. Council of Co-Owners of Saida II Towers Condominium Ass'n*, 706 S.W.2d 644, 645-46 (Tex. 1986); Tex. Ins. Code Ann. art. 21.49, §1 (Vernon 1981). It is an involuntary association created and maintained by the coercive power of the state; it is a "creature of statute." *Saida II* at 645-46; *Rowden v. Texas Catastrophe Prop. Ins. Ass'n*, 677 S.W.2d 83, 90 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.).

The State Board controls the operation of CATPOOL, issues any orders it deems necessary to supervise CATPOOL and adopts CATPOOL's plan of operation as an agency rule. *Texas Catastrophe Prop. Ins. Ass'n v. Miller*, 625 S.W.2d 343, 346 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ dism'd); Tex. Ins. Code Ann. art. 21.49, §5(c) (Vernon Supp. 1992); *Id.*, §5A (Vernon 1981). Unlike a private association where the board of directors is responsible to its members, CATPOOL is responsible and accountable to the State Board, not its member insurance companies. *Id.*, §5(g) (Vernon Supp. 1992).

In addition, CATPOOL performs administrative functions for the state. *Saida II* at 645-46; *Miller* at 346; Tex. Ins. Code Ann. art. 21.49, §9 (Vernon Supp. 1992). Such functions are not delegated to entities representing private interests. *See Beacon National Insurance Co. v. State Board of*

Insurance, 582 S.W.2d 616, 618-619 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.).

CATPOOL was created by the state for a public purpose, it is controlled by the state, it performs administrative functions for the state, it is accountable to the state and only exists as a result of the coercive power of the state. CATPOOL would have no existence, no members, and no funds without the state's coercive power. "Its power and property comes about only because it has the power of the state." *Board of Levee Comm'rs* at 143. In short, CATPOOL is "a civil institution to be employed in the administration of government" and the State of Texas may require it to use the services of the Attorney General "unrestrained by any limitations of its power imposed by the constitution of the United States." *Trustees of Dartmouth College* at 629-30.[2]

It is incompatible with the Constitution and a federalist system for the federal judiciary to interfere in a state's internal organization by adjudicating disputes between a state and its political subdivisions. *Board of Levee Comm'rs* at 143. Disputes as to a subdivision's structure, personnel, powers, authority and property are nonjusticiable political questions left

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[2] Civil rights cases on what constitutes state action are also informative. To determine whether there has been state action, the courts focus on whether there has been an exercise of coercive power or significant encouragement, either overt or covert, by the government. *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 107 S.Ct. 2971, 97 L.Ed. 427 (1987); *Blum v. Yaretsky*, 457 U.S. 991, 1004, 102 S.Ct. 2777, 2786, 73 L.Ed.2d 534 (1982). Texas has exercised pervasive, coercive power to create and sustain CATPOOL. Far beyond significant, overt encouragement by the state, CATPOOL is completely controlled by the state.

to the state legislatures. *City of Trenton*, 262 U.S. at 188, 43 S. Ct. at 537; *Board of Levee Comm'rs* at 143. This principle applies whether the state entity is functioning in a traditional governmental or in a proprietary role. *City of Trenton*, 262 U.S. at 191-92, 43 S.Ct. at 538; *Board of Levee Comm'rs* at 142.

CATPOOL's legal representation involves the internal structuring of a political institution: questions of personnel, organizational structure, and expenditure of funds obtained through state coercion. The Legislature has determined that CATPOOL should be represented by the Attorney General as "any other state agency." The Legislature's determination is final on such political questions in our federalist system. The Fifth Circuit's decision interferes with Texas' internal organization in contravention to federalist principles previously enunciated by this Court.

C. The Fifth Circuit's Analysis Will Not Withstand Scrutiny

Despite the above, the Fifth Circuit decided CATPOOL is not a part of the state because "the State of Texas is not alone interested in the assets of CATPOOL...member companies are vitally interested in their private monies." Appendix, p. A-10. This characterization of CATPOOL misapprehends the nature of the funds at CATPOOL's disposal. Or, in the words of the dissent:

> The majority, like the district court, misapprehends the CATPOOL scheme so as to imagine due process-violative takings from private pocket books when such deprivation is not in fact happening. This is where the

> majority, like the district court before it appears to have lost its way.

Dissent, Appendix, p. A-18.

The Fifth Circuit's conclusion that CATPOOL's funds are not public was based on a finding that "CATPOOL is directly funded by the private monies of private citizens and corporations — not by the funds of the public treasury." Appendix, p. A-2. An analysis of this finding reveals how the Fifth Circuit "lost its way." By focusing on whether the funds come from the treasury, the Fifth Circuit ignored the relevant inquiry — whether "the power of the state is used to deprive the producer of money, or the use of his money." *Conlen Grain and Mercantile, Inc. v. Texas Grain Sorghum Producers Board*, 519 S.W.2d 620, 623 (Tex. 1975).

In *Conlen Grain*, the Texas Supreme Court found that assessments on sorghum producers required to participate in a program to encourage production, marketing and use of sorghum were taxes. The Court held that whether the assessments were paid into the treasury, part of the general revenue of the state, or subject to appropriations by the Legislature was irrelevant. *Id.* The fact that the assessments were coerced was dispositive. *Id.* Thus, in this case, the inquiry is whether the assessments that fund CATPOOL are coerced, not whether the public treasury is involved.

It is manifestly the case that CATPOOL uses the power of the state to deprive its members of their money. Private insurers have no desire to insure coastal property. The Texas Legislature determined that it was in the public interest to compel private insurers to become members of a state created entity to provide this insurance. The only way to accomplish this public purpose is through assessments levied by CATPOOL on its involuntary members. "Ultimately, CATPOOL's funds

are *State funds*, because they are *raised through the State's coercive power for public purposes*. Thus, in this respect too, Texas' CATPOOL scheme fits within Chief Justice Marshall's *Dartmouth College* paradigm." Dissent, Appendix, pp. A-19-20, emphasis in original.

An examination of the hypothetical CATPOOL posited by the Fifth Circuit provides a final demonstration of how that court "lost its way." Before concluding, the Fifth Circuit reasoned:

> We hasten to recognize that a state has extremely broad powers to legislate for the welfare of those in the state. The State of Texas indeed has the power to create a state agency that is truly a part of the state—like the State Insurance Board—and fund that agency by burdensome taxes against insurers doing business in Texas. It could require that agency to rely solely on the services of the attorney general. Because private money is at risk through CATPOOL, the legislature has not created such an agency in CATPOOL.

Appendix, p. A-10. Such a hypothetical CATPOOL could be created by eliminating members' participation on the board of directors and having the members' assessments paid into the state treasury. Then, rather than approve the board's actions, the State Board would act as CATPOOL's board of directors. As necessary, the State Board would draw on members' assessments from the treasury. The only effective difference between CATPOOL and the Fifth Circuit's hypothetical CATPOOL is that rather than having limited input as members, property insurers would have no input. The source of the money would be the same. The money would be used for the

same purpose. But, in the Fifth Circuit's view, the character of the money would somehow be different.[3]

The Texas Legislature made a decision that it was in the best interests of the citizens of Texas to allow property insurers input into the operation of CATPOOL. The Fifth Circuit will require the Legislature to eliminate this input in order for Texas to be able to control its own creation. This untoward interference with the operations of the sovereign State of Texas is all the more outrageous since it is based on a distinction without a difference.

CONCLUSION

Whether CATPOOL is a part of the State of Texas is of paramount importance to Texas and this Petition for Writ of Certiorari should be granted because "the district court's preliminary injunction analysis [is] clearly erroneous — in terms of its evaluation of the essential nature of CATPOOL — and offensive to our country's constitutional scheme of federalism."[4]

Respectfully submitted,

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[3] The only potential distinction Petitioner can discern, implicit in the majority's phrase "burdensome taxes," is that Texas property insurers could end up paying more money.

[4] Dissent, Appendix, p. A-21.

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TEXAS CATASTROPHE PROPERTY INSURANCE ASSOCIATION, et al., Plaintiffs-Appellees,

v.

DAN MORALES, Individually and in his official capacity as Attorney General of the State of Texas, Defendant-Appellant.

No. 91-8593

United States Court of Appeals
Fifth Circuit.

October 28, 1992

Appeal from the United States District Court for the Western District of Texas.

Before JOLLY and DUHÈ, Circuit Judges, and PARKER[1], District Judge.

DUHÈ, Circuit Judge:

This appeal requires us to decide whether the district court abused its discretion when it issued a preliminary injunction preventing the Attorney General for the State of Texas from fulfilling his statutory duty to provide the sole legal representation for the Texas Catastrophe Property Insurance Association (CATPOOL), an entity comprised of private insurers that writes insurance policies covering risks as

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[1] Chief Judge of the Eastern District of Texas, sitting by designation.

prescribed by the State of Texas. We find no abuse of discretion and accordingly affirm the preliminary injunction.

I.

CATPOOL was created by the Texas Legislature in 1971. 1971 Tex. Gen. Laws 843 (codified as amended at Tex. Ins. Code Ann. art 21.49 (West 1981 & Supp. 1992)). CATPOOL is a sort of assigned risk pool; all of the property insurers in Texas are required to belong to the pool as a condition of doing business in the state. Tex. Ins. Code Ann. art 21.49 § 4(a)(West 1981). The pool must write "windstorm, hail and fire insurance" in designated parts of the State. *Id.* § 1. CATPOOL writes its own policies and pays its own claims, which are funded first from premiums, then from assessments against the member companies. In short, CATPOOL is directly funded by the private monies of private citizens and corporations-not by the funds of the public treasury. If the losses exceed a certain amount, the companies that fund CATPOOL are entitled to limited tax credits from the state. The parties do not dispute these facts.

According to the statute that created it, CATPOOL is run according to a plan of operation adopted in a rulemaking procedure by the State Board of Insurance with the advice of the CATPOOL board of directors. *Id.* § 5(c)(West Supp. 1992). Representatives of the member insurance companies comprise a majority of the board of directors. The directors are "responsible and accountable" to the State Insurance Board. *Id.* § 5(g). Since its creation, CATPOOL has employed its own private legal counsel.

A recent amendment to the statute, however, requires CATPOOL to rely exclusively on the Texas Attorney Genera] for legal representation, and the constitutionality of that amendment is the subject of this suit. By an act effective September 1, 1991, the Legislature proclaimed: "The

association [CATPOOL] is a state agency for purposes of employing or authorizing legal representation and shall be represented by the attorney general in the manner provided by general law for representation of any other state agency by the attorney general." 1991 Tex. Gen. Laws 1077 (codified at Tex. Ins. Code Ann. art. 21.49, § 12A (West Supp. 1992)).

On September 3, CATPOOL and some of its member insurance companies filed this action under 42 U.S.C. § 1983, claiming that the amendment requiring CATPOOL to be represented by the attorney general deprived it of rights guaranteed by the federal constitution. In particular, CATPOOL prayed the district court to enjoin enforcement of the amendment on the ground that the new law stripped the association of its constitutional right to counsel. After a hearing, the district court agreed with CATPOOL and issued the preliminary injunction. The attorney general appeals.

II.

There are four requirements for a preliminary injunction: "(1) a substantial likelihood of success on the merits; (2) a substantia] threat that the movant will suffer irreparable injury if the injunction is not issued; (3) that threatened injury to the movant outweighs any damage the injunction might cause to the opponent; and (4) that the injunction will not disserve the public interest." *Apple Barrel Prods. v. Beard*, 730 F.2d 384, 386 (5th Cir. 1984). These four requisites are mixed questions of law and fact. Although we broadly review the district court's legal conclusions, its findings of facts will not be disturbed unless they are clearly erroneous. We will not reverse unless the appellant shows that the district court abused its discretion. *Id.*

The attorney general has not disputed the district court's holdings on the issues of irreparable harm, the public interest, and relative lack of harm to the attorney general. Having

reviewed the district court's opinion, we believe that the court soundly exercised its discretion when it held for the Plaintiffs on those three issues, and we focus the remainder of our opinion on the question that the parties have asked us to resolve: whether there is a substantial likelihood that the Plaintiffs will prevail on the merits of their claim.

III.

The central question in this § 1983 suit is whether any federally guaranteed right of CATPOOL has been violated. The attorney general, apparently not disputing that a right to retained counsel in civil matters generally exists, argues that CATPOOL is a state agency and therefore has no constitutional rights to assert against the state which created it, and which could destroy it if the Legislature decided to do so. We conclude that there is a constitutionally guaranteed right to retain hired counsel in civil matters, that the right in this case is grounded in the Fourteenth Amendment due process clause, and that CATPOOL holds such a right.

A.

Nowhere does the Constitution specifically say that a state cannot deprive persons of counsel in civil trials,[2] but a number of cases address the question. *See, e.g., McCuin v. Texas Power & Light Co.*, 714 F.2d 1255, 1262-65 (5th Cir. 1983); *Mosley v. St. Louis Sw. Ry.*, 634 F.2d 942, 945-46 (5th Cir. Unit A Jan. 1981), *cert. denied*, 452 U.S. 906, 101 S.Ct. 3032, 69 L.Ed.2d 407 (1981); *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1117 (5th Cir., *cert. denied*, 449 U.S. 820, 101 S.Ct. 78, 66 L.Ed.2d 22 (1980); *accord Gray v. New*

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[2] *Cf.* U.S. Const. amend. VI ("In all *criminal prosecutions*, the accused shall enjoy the right ... to have the assistance of counsel for his defence.") (emphasis added).

England Tel. & Tel. Co., 792 F.2d 251, 257 (1st Cir. 1986). This Court has construed Supreme Court precedent to find "a constitutional right to retain hired counsel." *Id.* at 1118 (construing *Powell v. Alabama*, 287 U.S. 45, 69, 53 S.Ct. 55, 64, 77 L.Ed. 158 (1932)). *But see Kentucky W. Va. Gas Co. v. Pennsylvania Public Utility Comm'n*, 837 F.2d 600, 618 (3d Cir.) (The Supreme Court has not recognized a constitutional right to counsel in a civil case ....."), *cert. denied*, 488 U.S. 941, 109 S.Ct. 365, 102 L.Ed.2d 355 (1988). As Supreme Court stated,

> If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

Powell, 287 U.S. at 69, 53 S.Ct. at 64. The *Powell* Court, which directly reviewed a state conviction, was speaking of the Fourteenth Amendment due process clause,[3] while *Potashnick* applied the Fifth Amendment due process clause to a deprivation caused by a federal court. *Potashnick*, 609 F.2d at 1117. Because the deprivation in the instant case is caused by a state, the Fourteenth Amendment due process clause is the appropriate amendment on which to base this due process claim.[4]

The right to counsel in civil matters "includes the right to choose the lawyer who will provide that representation." *McCuin*, 714 F.2d at 1257. While this right is "one of

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[3] *Powell*, 287 U.S. at 50, 53 S.Ct. at 57.

[4] The district court based its decision on the Fifth Amendment, but that error is harmless.

constitutional dimensions and should be freely exercised without impingement,"[5] the right is not absolute. *McCuin*, 714 F.2d at 1262. If the state can show "compelling reasons," then a party's right to choose its own counsel may be overridden. We can find no intimation in the record of the case at bar, though, that the State of Texas has met the extraordinary burden of showing that it is compelled to deprive CATPOOL its fundamental right[6] to choose its own counsel.

The district court specifically found that the reasons proffered by the attorney general in support of this statute are not compelling in the constitutional sense. Before this Court, the attorney general has argued that the state's interests are "important,"[7] but for purposes of constitutional analysis, "important" reasons do not suffice where the Constitution requires "compelling" ones. We do not mean to say that the attorney general cannot, as a matter of law, satisfy this burden when it comes time for him to oppose a permanent injunction. For the present, we are only concerned with a substantial likelihood of success on the merits, and we do not believe that the district court abused its discretion when it found that CATPOOL is likely to prevail on this point.

B.

Having concluded that there is a constitutional right to retained counsel in civil cases, and that this right may not be impinged without compelling reasons, we must ask whether CATPOOL holds this right. A state agency has no constitutional rights to assert against the state of which it is a part. *Board of Levee Comm'rs of the Orleans Levee Board v.*

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[5] *Mosley*, 634 F.2d at 946.

[6] *McCuin*, 714 F.2d at 1262.

[7] *Eg.*, Appellant's Br. at 23-24.

Huls, 852 F.2d 140, 143 (5th Cir. 1988). The attorney general has founded much of his case upon this principle, but the principle cannot uphold the elaborate argument that he has tried to build upon it.

The principle that a state agency has no constitutional rights to assert against the state that created it is predicated on the concept that state agencies generally, if not always, are parts of the state itself. The parties have expended many pages on the questions of whether CATPOOL is a "state agency." The more appropriate question is whether CATPOOL is part of the state. For if CATPOOL be a part of the state, it cannot make any constitutional claims against the state; the agency and the state would be one and the same thing.

State government, as it may be conceived for our present purposes, is a great compendium of powers. It may make laws governing a vast array of activities, as is evidenced by the shelves filled with state statutes on myriad subjects. Sometimes, for the sake of convenience, a state will squeeze off some of this power to a political subdivision that it has created, such as a municipality or a levee board. Then that smaller state entity-that "political subdivision"[8] or "auxiliar[y]"[9] or "arm[]"[10] of the state-takes charge of the function assigned to it and exercises the power delegated to it.

Thus a levee board may expropriate land and develop a levee system, using the power of expropriation and development

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[8] *City of Trenton v. New Jersey*, 262 U.S. 182, 185, 43 S.Ct. 534, 536, 67 L.Ed. 937 (1923).

[9] *Town of Mount Pleasant v. Beckwith*, 100 U.S. 514, 524, 25 L.Ed. 699 (1880).

[10] *City of Pawhuska v. Pawhuska Oil & Gas Co.*, 250 U.S. 394, 398, 39 S.Ct. 526, 528, 63 L.Ed. 1054 (1919).

that was delegated by the state when the state created the levee board. The expropriated land belongs to the state because the levee board that took it is part of the state. *Huls*, 852 F.2d at 143. If the state then decides that the land should no longer be in the charge of the levee board but should be transferred to the park service, no constitutional claim arises. It is the state's land, and the state can move the land from part of itself to another. A federal court would not entertain a suit by the levee board against the state, for "[t]o allow [such a] suit would be to allow the state to sue the state over state land." *Id.*

Similarly, a private company that holds rights granted by a state may assert a contract clause [11] claim if the state impinges upon that contract. If the same company conveys its rights to a municipality, however, and the state then impinges on the municipality's rights, no federal court will entertain the suit. *City of Trenton v. New Jersey*, 262 U.S. 182, 43 S.Ct. 534, 67 L.Ed. 937 (1923). As Chief Justice Marshall first stated the principle that a part of the state may not sue the state under the federal constitution:

> If the act of incorporation be a grant of political power, if it create a civil institution to be employed in the administration of the government, or if the funds...be public property, or if the state..., as a government, be alone interested in its transactions, the subject is one in which the legislature of the state may act according to its own judgment, unrestrained by any limitation of its power imposed by the constitution of the United States.

Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 629-30, 4 L.Ed. 629 (1819).

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[11] U.S.Const. art. I, § 10.

The relevant inquiry, then, is one of identity: the material question is whether CATPOOL is a part of the state. The district court held that CATPOOL is not a part of the state, and we agree. If CATPOOL makes a profit, that money does not go to the state. Although some profits are used to purchase reinsurance, the member companies may receive distributions from profits. Tex. Ins. Code Ann. art. 21.49, § 5(b)(West Supp. 1992). If losses exceed premiums, the member companies are assessed, not the public treasury. *See id.* When CATPOOL loses, the bank accounts of its members are depleted, not the public treasury. The fact that losses are subsidized in part through the allowance of tax credits does not eliminate the risk to the private entities' capital. When CATPOOL wins, the bank accounts of its members may be augmented, not the public treasury. Hypothetically, if CATPOOL's lawyer is incompetent or disloyal, the members, who are private companies, lose money, not the public treasury.

That the state holds, and exercises, the coercive power to force private insurers doing business in Texas to cover certain risks[12] does not mean that the money coming out of the companies' bank accounts is state money. It is private money directed to pay private claims. Indeed, the amount of money paid on individual claims depends on its attorneys' successfully advancing their positions. The act creating CATPOOL is not "a grant of political power," as in the case of a municipality or other political subdivision; CATPOOL is not "employed in the administration of the government";[13] and the funds that will be

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[12] This power is not disputed in this suit, and we assume that the state does hold such a power for purposes of this decision. We express no opinion on the validity of such a power.

[13] The attorney general argues that CATPOOL "serves as an integral part of the State [Insurance] Board's administrative process for claims." Appellant's Reply Br. at 6. Administration and processing of claims, even when done pursuant to the State Insurance Board's process, hardly makes this an agency involved "in the administration of the government."

used if counsel is incompetent or disloyal come from the accounts of private companies, where that money could remain if it were protected by counsel. In short, the State of Texas is not alone interested in the assets of CATPOOL. *See Dartmouth College*, 17 U.S. (4 Wheat.) at 629-30. Rather, the member companies are vitally interested in protecting their private monies, and the State of Texas cannot deprive those companies of the rights guaranteed them by the Constitution of the United States to protect their private property.

We hasten to recognize that a state has extremely broad powers to legislate for the welfare of those in the state. The State of Texas indeed has the power to create a state agency that is truly a part of the state-like the State Insurance Board-and fund that agency by burdensome taxes against insurers doing business in Texas. It could require that agency to rely solely on the services of the attorney general. Because private money is at risk through CATPOOL, the legislature has not created such an agency in CATPOOL. The state can deprive itself of any constitutional rights, as it deems wise, but it cannot prevent private insurers from protecting their own money with retained counsel of their choice.

We conclude that CATPOOL holds the right to counsel, as explained above. *See supra* section III.A. The recent amendment to the CATPOOL statute has deprived CATPOOL and its member insurers of that right, and the district court was correct to hold that the Plaintiffs have a substantial likelihood of success on the merits.

IV.

The attorney general has also challenged the standing of the Plaintiffs. Article III of the Constitution requires a plaintiff

> to "show that he personally has suffered some actual or threatened injury as a result of the

> putatively illegal conduct of the defendant," *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99, 99 S.Ct. 1601, 1608, 60 L.Ed.2d 66 (1979), and that the injury "fairly can be traced to the challenged action" and " is likely to be redressed by a favorable decision," *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41, 96 S.Ct. 1917, 1924, 1925, 48 L.Ed.2d 450 (1976).

Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982). As should be apparent from the previous discussion,[14] CATPOOL and its member insurers stand to lose a constitutionally guaranteed right if section 12A is enforced. If the adjudicating court issues the injunction that the Plaintiffs seek, the State of Texas will be unable to enforce the new amendment and the Plaintiffs' injury will be relieved. The Plaintiffs have shown standing.

We are puzzled by the attorney general's argument that CATPOOL itself (as distinct from its member companies) has no standing because it did not adequately, comply with the Texas Open Meetings Act. *See* Tex. Ins. Code Ann. art. 21.49, § 5(k)(West Supp. 1992) (requiring notice of meetings to be given according to Tex. Rev. Civ. Stat. Ann. art. 6252-17 (West Supp. 1992)). Standing is determined according to the criteria set out in the previous paragraph, and CATPOOL has met those standards. The attorney general may have some cause of action under state law if he is correct in arguing that CATPOOL inadequately complied with its notice obligations, but we discern no standing issue.

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[14] *See supra* Part III.

V.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

ROBERT M. PARKER, District Judge, dissenting:

I agree with the majority opinion that the central question in this Section 1983 suit is whether CATPOOL is a part of the State of Texas, because a part of a state cannot assert constitutional rights against that state.[1] But beyond this point, I must part from my colleagues.

The majority opinion attempts to distinguish CATPOOL from the agency auxiliaries to which the majority recognizes a state may delegate powers and functions, on the ground that CATPOOL's member companies risk the loss of their own, private funds, and enjoy the possibility of private profit, or "augmentation." At oral argument, Appellees characterized CATPOOL as a group of private insurers protecting their private pocketbooks. I write in dissent because I do not agree that the money at risk is the "private" money of the CATPOOL member companies, and because the undisputed facts before the Court establish that CATPOOL is indeed a part of the State of Texas. Because CATPOOL's member companies cannot satisfy their burden with respect to the issuance of a preliminary injunction in this case, I would hold that the district court judge

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[1] It is fundamental that state entities and political subdivisions have no due process or other rights to sue the state creating and sustaining them. *See generally Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36, 53 S.Ct. 431, 77 L.Ed. 1015 (1933); *City of Trenton v. State of New Jersey*, 262 U.S. 182, 43 S.Ct. 534, 67 L.Ed. 937 (1923); *Board of Levee Commissioners of the Orleans Levee Board v. Huls*, 852 F.2d 140, 143 (5th Cir. 1988).

erred in granting them the injunction at issue. *See Canal Authority v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974) (preliminary injunction can be granted only when the district court has found "*a substantial likelihood* that plaintiff will prevail on the merits.") (emphasis added).

I. CATPOOL: State Entity

The majority opinion recognizes that the Texas Legislature could create a public insurance entity that is a part of the State, fund it by taxing insurers, and require it to rely solely on the services of the Attorney General. The Texas Legislature has done just that in clear and unambiguous language in the Catastrophic Property Insurance Pool statute. CATPOOL is a creature of state statute. *Rowden v. Texas Catastrophe Prop. Ins. Ass'n*, 677 S.W.2d 83, 90 (Tex. App.--Corpus Christi 1984, writ ref'd n.r.e.). The CATPOOL legislation indicates that CATPOOL is indeed "a part of" the State of Texas. As the majority notes: CATPOOL was created by the Texas Legislature to provide windstorm and hail insurance to homes and businesses in the fourteen Texas counties along the Gulf Coast; the Texas Legislature created CATPOOL in 1971 to provide this windstorm and hail insurance. Prior to the emergence of the CATPOOL legislation, these areas of Texas were not insurable; private insurers in the pre-CATPOOL market were disinclined to insure such high-hurricane risk property. In short: the Legislature intended CATPOOL to promote the public interest by protecting the economic security of Texas citizens along the coast by insuring their homes and businesses, and by promoting economic growth and development along the Texas coast. *See generally Rowden, id.*

CATPOOL is funded through the coercive power of the State of Texas. Insurance companies doing business in Texas are compelled to be members of CATPOOL in order to be

licensed by the State to sell insurance. Tex. Ins. Code Ann. art. 21.49, § 4(a) (West 1989). CATPOOL's public purpose is evident from its character as an auxiliary of the State Board of Insurance. As the majority appreciates:

> Sometimes, for the sake of convenience, a state will squeeze off some of [its great compendium of powers] to a political subdivision that it has created, such as a municipality or a levee board. Then that smaller state entity-that "political subdivision" or "auxiliar[y]"[ ] or "arm[ ]"[ ] of the state-takes charge of the function assigned to it and exercises the power delegated to it.

But the majority fails to recognize that, because CATPOOL operates as a necessary arm of the State Board of Insurance-itself an auxiliary of the State of Texas-CATPOOL is a State entity; that is, CATPOOL is "a part of the State" for purposes of constitutional analysis.

The circumstances of this case *do* satisfy the explanatory hypothetical posited by the majority. If the State of Texas decides, as it has, that the funds assessed against CATPOOL's member companies should be assessed by way of the State Board of Insurance-controlled CATPOOL scheme-as opposed to an arguably less efficient scheme operated through the State Board of Insurance, proper-no constitutional claim arises. It is the State's money obtained by force of the State's coercive power-and the State can move the money from one part of itself to another (*i.e.*, from the State Board of Insurance, which sets the assessment, to the State Board of Insurance-controlled CATPOOL). Such an administrative decision is for the State to make. As a matter of fundamental constitutional principle (federalism), a federal court should avoid wedging itself into such decisions.

The CATPOOL Legislation

The Texas Legislature, in creating CATPOOL, granted political power to this entity of its own creation. In essence, CATPOOL is a legislatively created, civil institution to be

employed in the administration of Texas government. It is clear to me that Texas' CATPOOL scheme falls on the state side of the federalism markings left by Chief Justice Marshall in 1819. *See Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 629-630, 4 L.Ed. 624 (1819) ("*If the act of incorporation be a grant of political power, if it create a civil institution, to be employed in the administration of the government*, or if the funds ... be public property, ... the subject is one in which the legislature of the state may act according to its own judgment, unrestrained by any limitation of its power imposed by the constitution of the United States.")

In addition to setting the assessments imposed involuntarily upon CATPOOL's member companies, the State Board of Insurance sets insurance premium rates. Wind and hailstorm losses and expenses incurred by CATPOOL are primarily covered by dollars collected through the State Board of Insurance-set premiums *paid by the insured persons of Texas*. The district court found that the maximum amount of premiums collected during a single year by CATPOOL is $21 million. But, as the district court found yet failed to appreciate: any time premiums exceed losses in a given year, those excess dollars are used to purchase reinsurance to cover loss exposure for possible future-year losses in excess of premiums. If ever such losses and expenses exceed CATPOOL's premium and reinsurance funds, the CATPOOL member companies are assessed so that CATPOOL can cover the losses and expenses under such circumstances. The companies are assessed in

amounts proportionate to the amount of business they respectively wrote during the previous year.

The State Board of Insurance has complete authority to adopt, revise and amend CATPOOL's plan of operation, and CATPOOL's Board of Directors is responsible and accountable to the State Board of Insurance. Tex. Ins. Code Ann. art. 21.49 §§ 4 and 5 (Vernon Supp. 1992). Indeed, CATPOOL's plan of operation (*i.e.*, its by-laws) must be adopted by the State Board as an *agency* rule. Tex. Ins. Code Ann. art. 21.49, § 5(c) (Vernon Supp. 1992). Thus, CATPOOL is completely controlled by the State Board of Insurance, *not* simply regulated by it.[2]

CATPOOL performs administrative functions; CATPOOL serves as an integral part of the State Board's administrative process for claims. For example, the CATPOOL Act provides that claims are first determined by CATPOOL, whose decisions, considered "agency order[s]," are appealable to the State Board. Tex. Ins. Code Ann. art. 21.49, § 9 (Vernon Supp. 1992). *Texas Catastrophe Prop. Ins. Ass'n v. Miller*, 625 S.W.2d 343, 346 (Tex. Civ. App.-Houston [14th Dist.] 1981, writ dism'd); *see also Rowden v. Texas Catastrophe Prop. Ins. Ass'n*, 677 S.W.2d 83, 89 (Tex. App.-Corpus Christi 1984, writ ref'd n.r.e.); *Texas Catastrophe Property Insurance Association v. Miller*, 625 S.W.2d 343 (Tex. Civ. App.-Houston [14th Dist.] 1981, writ dism'd). Functions like those exercised by CATPOOL are *delegated* by the Texas Legislature to state administrative bodies to further public purposes; they are not granted to private entities representing private interests. *Beacon National Insurance Co.*

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[2] In contrast, a state-regulated private corporation's Board of Directors is responsible to the corporation's private shareholders, not to the State. Accordingly, a private corporation's primary duty is private-interested, not public-interested: the private corporation's primary task is to earn private profit for its shareholders (within the bounds of public-interested regulations).

v. State Board of Insurance, 582 S.W.2d 616, 618-619 (Tex. Civ. App.-Austin 1979, writ ref'd n.r.e.). Indeed, the Texas Supreme Court has construed the administrative process involving the State Board and its auxiliary, CATPOOL, as one "administrative body." *Texas Catastrophe Prop. Ins. Ass'n v. Council of Co-Owners of Saida II Towers Condominium Ass'n et al.*, 706 S.W.2d 644, 645-646 (Tex. 1986).

Other provisions of the CATPOOL Act indicate that CATPOOL is a state entity. First, CATPOOL is explicitly subject to the Texas Open Meetings Act, which Act applies only to governmental bodies. Tex. Ins. Code Ann. art. 21.49, § 5(k) (Vernon Supp. 1992). Tex. Rev. Civ. Stat. Ann. art. 6252-17, § 1(c) (Vernon Supp. 1992). No private entities are subject to the Texas Open Meetings Act, whose purpose in fact is to "enable public access to and to increase public knowledge of government decisionmaking. *City of San Antonio v. Fourth Court of Appeals*, 820 S.W.2d 762, 765 (Tex. 1991).

The Act also provides CATPOOL immunity from liability in some circumstances. Basically, CATPOOL enjoys immunity for property inspections and statements made at administrative hearings. Tex. Ins. Code Ann. art. 21.49, § 10 (West 1989). Immunity from liability is an attribute of a sovereign. *See e.g., Stout v. Grand Prairie Independent School District*, 733 S.W.2d 290, 297 (Tex. App.-Dallas 1987, writ ref'd n.r.e.).[3]

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[3] Of course, the Legislature may waive sovereign immunity whenever it chooses. And the Texas Legislature did just that in September, 1991, relative to one aspect of CATPOOL's sovereign immunity. Until September, 1991, CATPOOL, unlike private insurers, was immune to "bad faith" lawsuits under Article 21.21 of the Texas Insurance Code. *See Leisure Services, Inc. v. Texas Catastrophe Property Insurance Association*, 712 S.W.2d 266, 267-268 (Tex. App.-Austin 1986, writ ref'd n.r.e.). Unhappy with CATPOOL's treatment of insureds, the Legislature amended the Act to apply Article 21.21 to CATPOOL. The fact emphasized by the majority, that "[s]ince its creation, CATPOOL has employed its own private legal counsel," is one properly understood in the light of this sovereign power of waiver. (This

Finally, the Texas Legislature has specified, in the statutory amendment at the center of this case, that CATPOOL is a "state agency for purposes of employing or authorizing legal representation and shall be represented by the Attorney General in the manner provided by general law for representation of any other state agency by the Attorney General." Tex. Ins. Code Ann. art. 21.49, § 12A (Vernon Supp. 1992).

II. CATPOOL Funds, Private and Public Interests: The Proper Perspective

The majority, like the district court, misapprehends the CATPOOL scheme so as to imagine due process-violative takings from private pocketbooks when such deprivation is not in fact happening. This is where the majority, like the district court before it, appears to have lost its way.

True, CATPOOL is funded in part through State-coerced assessments against all Texas insurance companies.[4] Texas courts have held that similar assessments amounts to State taxes, and accordingly, have upheld them-*i.e.*, because they are "imposed upon and extracted from producers by governmental authority for a *public purpose*." *Conlen Grain and Mercantile, Inc. v. Texas Grain Sorghum Producers Board*, 519 S.W.2d 620, 623 (Tex. 1975) (emphasis added). *See also Friedman v. American Surety Co. of New York*, 137 Tex. 149, 151 S.W.2d 570, 577 (1941). It is, then, irrelevant whether CATPOOL receives money from the State Treasury or directly from private sources conscripted for a special public purpose. Governmental

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counsel-waiver fact is also, I think, properly understood as partially a pragmatic product of the State's fiscal concerns.)

[4] The other, more fundamental part of CATPOOL's funds comes by way of the premiums set by the State Board of Insurance and paid by the insured persons of Texas.

funds always come from private sources. Ultimately, CATPOOL's funds are *State funds*, because they are *raised through the State's coercive power for public purposes*. Thus, in this respect too, Texas' CATPOOL scheme fits within Chief Justice Marshall's *Dartmouth College* paradigm. *See Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 629-630, 4 L.Ed. 629 (1819) ("If the act of incorporation be a grant of political power, if it create a civil institution, to be employed in the administration of the government, or if the funds ... be public property, ... the subject is one in which the legislature of the state may act according to its own judgment, unrestrained by any limitation of its power imposed by the constitution of the United States.").

Moreover, while it is possible that CATPOOL's losses in any catastrophe year might exceed the then current amount of premiums-derived money in CATPOOL's coffer-so that the members will have to pay at once the difference-the private pocketbooks of the CATPOOL member companies are ultimately protected in various ways. First, *excess* money from year to year, derived from the members' selling of insurance premiums, is *invested* by CATPOOL; CATPOOL uses such profits to purchase *reinsurance-i.e.*, to cover the costs associated with the expected major wind and hailstorm catastrophes of the future. Second, there is a scheme of tax credits in place to compensate companies paying any "excess" (damage claim) assessments in any year (*i.e.*, when the reinsurance money in any "catastrophe year" is not then sufficient to cover the costs of the catastrophe).

It is, finally, important to realize the following. The insurance companies comprising CATPOOL's membership are not *forced* to do business in Texas. They *choose* to operate their businesses in the Texas insurance market. Membership in CATPOOL, and all that such membership entails, is simply a businessperson's calculated cost or condition of operating an

insurance business in Texas. If the State Board of Insurance failed to set premiums at a rate affording insurance companies the ability to operate at a profit-*i.e.*, at a rate overcoming the business cost associated with potential CATPOOL assessments-these companies would soon disappear from the Texas landscape.

In sum: the State of Texas has a substantial interest in making sure CATPOOL's member companies are not assessed so often or to such an extent that they lose money. Texas protects this interest primarily through her insurance-specialist alter ego, the State Board of Insurance-which sets the rates of the insurance premiums: (1) CATPOOL's member companies sell, and (2) comprising the primary source of funds to which State Board of Insurance-auxiliary, CATPOOL, turns in order to cover losses and expenses associated with wind and hailstorm catastrophes along the Texas Gulf Coast. Texas supplements the protection of her interest in attracting and accommodating private insurance companies through a tax credit scheme, which scheme ameliorates the impact of any assessments CATPOOL must make against its members.

The majority, like the district court, focuses (1) on the fact that CATPOOL currently carries but $137 million worth of reinsurance (while an "average CAT. 4" hurricane hitting the Texas Coast would evidently generate $1 billion worth of damage claims); and (2) on the fact that a CATPOOL member company can only credit 20% of a loss *per tax year* under the CATPOOL tax credit scheme. In so circumscribing its vision, the majority, like the district court, freezes aspects of the CATPOOL funding scheme in time and out of context so as to misconstrue the CATPOOL funding scheme's true, holistic nature.

Additionally, to the extent the private CATPOOL-member companies feel the need to employ their own counsel to protect their peculiar interests within the

administrative scheme created by the Texas Legislature, they may do so. The CATPOOL Act itself recognizes this through its authorization that: (1) "any affected insurer who may be aggrieved by any act, ruling or decision of the Association [CATPOOL] . . .[to] appeal to the commissioner [of Insurance]," and (2) any "person aggrieved by any order or decision of the commissioner" to appeal to a District Court in Travis County, Texas .....".[5]

III. Conclusion

CATPOOL would have no existence and no funds if it were not for the State's coercive power. And the private interests implicated by the CATPOOL legislation appear insignificant in comparison to the enormous public interests at stake. The Texas Legislature operated within its authority when it amended the CATPOOL statute so as to explicitly designate the Attorney General of Texas as CATPOOL's representative. Because I find the district court's preliminary injunction analysis clearly erroneous-in terms of its evaluation of the essential nature of CATPOOL-and offensive to our country's constitutional scheme of federalism, I would reverse.

I respectfully dissent.

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[5] Tex. Ins. Code Ann. art. 21.49 § 9 (Vernon Supp. 1992).

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TEXAS CATASTROPHE PROPERTY INSURANCE ASSOCIATION, REPUBLIC INSURANCE COMPANY, and UNION STANDARD INSURANCE COMPANY

VS.

DAN MORALES, individually, and in his official capacity as the ATTORNEY GENERAL OF THE STATE OF TEXAS

CIVIL NO. A-91-CA-686

ORDER

Before the Court on September 18, 1991, came the hearing on Plaintiffs' Motion for Preliminary Injunction. By this Order the Court seeks to resolve the outstanding matters taken under advisement by the Court at that time.

During the Preliminary Injunction Hearing, the Court heard the arguments of counsel and received evidence into the record. The Court considered the testimony of Frank R. Rogers, Jr. and of William C. Thornton, presented as witnesses for the Plaintiffs. The Court has evaluated the credibility of both witnesses and weighted their testimony accordingly in determining the merit of the Motion for Preliminary Injunction. Upon review of the Motion, the responses filed, briefing by the parties and amicus curiae, the evidence and argument presented at the hearing, and the relevant case law, the Court finds that Plaintiffs' Motion has merit and should be GRANTED.

GROUNDS FOR ORDER

Plaintiffs filed this action with the Court on September 3, 1991, as a civil rights suit for declaratory and injunctive relief pursuant to 42 U.S.C. Section 1983 and 28 U.S.C. Sections 2201 and 2202.

Texas Catastrophe Property Insurance Association (also referred to as T.C.P.I.A., CATPOOL, and the Association) and two of its member companies seek a preliminary injunction pursuant to Fed. R. Civ. P. 65. Plaintiffs seek to restrain Dan Morales, individually and in his capacity as Attorney General of Texas, from invoking or enforcing Section 12A of the Texas Insurance Code Article 21.49 as added by H.B. 2 of the 72nd Legislature of the State of Texas. Section 12A provides as follows:

> LEGAL COUNSEL. The association [T.C.P.I.A.] is a state for the purposes of employing or authorizing legal representation and shall be represented by the attorney general in the manner provided by general law for representation of any other state agency by the attorney general.

Plaintiffs argue that they are entitled to a preliminary injunction because this amendment to the Texas Catastrophe Property Insurance Pool Act, effective September 1, 1991, is unconstitutional on its face as a denial of T.C.P.I.A.'s and its members' rights to due process of law and equal protection under the Fifth and Fourteenth Amendments to the United States Constitution. Plaintiffs also claim relief under a pendant claim asserting violations of Texas state law. Tex. Gov. Code, § 402.005 (Vernon 1990); TEX. CONST. art. III, § 51 (Vernon 1984) and TEX. CONST. art. XVI, § 6 (Vernon Supp. 1991). The Court has determined that its rulings regarding this

motion and other matters in this case can be adequately and sufficiently decided based upon the Federal Constitutional questions presented in this action. The Court declines to exercise its permissive jurisdiction over the pendant Texas state law claim in this suit.

ACCORDINGLY, IT IS ORDERED that plaintiffs' state law claim is DISMISSED WITHOUT PREJUDICE from this action. The Court retains jurisdiction over the remaining Federal claims in this suit.

I. FINDINGS OF FACT

Plaintiffs presented Frank R. Rogers, Jr. and William C. Thornton as witnesses at the Preliminary Injunction Hearing. The Court now summarizes the testimony of Frank R. Rogers, Jr. and William C. Thornton:

Mr. Rogers is the current manager of T.C.P.I.A. and has been in that position for the last two years. Rogers started working for the Association in 1981 as a loss manager and has worked in the insurance industry for 25 years.

Mr. Thornton is the president of Union Standard Insurance Company, which is a part of the W.R. Berkeley Corporation. Mr. Thornton's company is a member of the "CATPOOL." Thornton is also the incoming chairman of the Texas Insurance Advisory Association (TIAA). The TIAA advises the Texas State Board of Insurance as to rates, coverage forms, and rules, and collects property insurance statistics for the state. TIAA also is party to a management agreement for T.C.P.I.A. for management of facilities.

T.C.P.I.A.

The Texas Catastrophe Property Insurance Association is a statutorily mandated, nonprofit, involuntary association of all of the property insurance companies authorized to write property insurance in the State of Texas. During the 1971 session, the Texas Legislature declared that all private insurance companies wishing to write property insurance in the State of Texas, must be a member of the T.C.P.I.A as a condition of certification of their license to do business in Texas. TEX. INS. CODE ANN. art. 21.49, § 1 (Vernon 1981).

The purpose of T.C.P.I.A. is to bring private property insurance writers into a catastrophe insurance pool in order to provide adequate hail and windstorm coverage along the 14 county Texas coastal area. Hurricane damage in these coastal counties creates the greatest risk exposure faced by property insurers in Texas. Because of this high risk exposure, the legislature made involuntary association in the catastrophe pool a prerequisite for writing any type of property insurance in the state.

Losses and expenses of the Association are paid by the individual private member companies from the private funds of those companies. Losses and expenses are first paid out of the premiums collected during the year; the State Board of Insurance sets the amount of the premium. The maximum amount of premiums ever collected in a single year by the CATPOOL is $21 million (Mr. Rogers estimated that an "average Cat. 4" hurricane hitting the Texas coast would generate one billion dollars worth of claims).

Losses between $21 million and $100 million are paid out of pocket by the individual members in proportion to the amount of business that each member company wrote during the previous year. T.C.P.I.A. and its member companies do not receive any state funds or tax revenues to help offset losses in

excess of premiums. The only benefit conferred upon the Association for providing the high risk coverage to the 14 coastal counties is a premium tax credit for losses above $100 million. Even if a member company claims its proportionate share of the tax credit for a loss over $100 million, the company still must pay for the loss out of its private earnings and can only credit a maximum of 20% of the loss per tax year.

If premiums exceed losses in a given year, the member companies do not receive any profit. All excess premiums are used to purchase reinsurance to cover loss exposure for losses in excess of premiums in future years. T.C.P.I.A. carries $137 million worth of reinsurance currently.

The State does not pay or subsidize the salaries of any T.C.P.I.A. employee. T.C.P.I.A. and its members must pay all judgments rendered against the Association, including liability for treble damages under Section 21.21 of the Texas Insurance Code, and are not entitled to reimbursement from the state. T.C.P.I.A. does not receive any state money, direct or indirect, except for each member's proportionate amortized premium tax credit for losses $100 million.

T.C.P.I.A. is not exempt from paying state sales tax, premium tax, maintenance tax, or federal income tax. In addition, T.C.P.I.A. files as a partnership, not a state agency, for federal income tax purposes.

LEGAL REPRESENTATION

The authority of the Legislature to mandate the forced membership of private companies in T.C.P.I.A. is not being challenged in this case. The T.C.P.I.A. and its members only challenge the validity of Section 12A, the recent legislative infringement on their right to spend their private funds on the legal representation of their choice.

T.C.P.I.A. has selected and been represented by private legal counsel for the last 20 years. T.C.P.I.A. objects to the sudden revelation by the sponsors of this legislation that the Association is a "state agency for the purposes of legal representation" only and the handing over to the political office of the attorney general the decision of how their private funds should be spent to represent their legal interest. Section 12A takes away T.C.P.I.A.'s and its members' ability to hire, fire, and direct the actions of the representative of their legal interests.

CATPOOL insures approximately four and a half billion dollars of property. Under Section 12A, the attorney general is the legal representative of the CATPOOL in all legal matters involving the association and its members. This means that all claims disputes, all rate hearings before the State Board of Insurance, all daily legal matters, must statutorily be handled wholly within the existing divisions of the already busy attorney general's office.

Since it is doubtful that the attorney general will hire a few dozen more assistant "A.G.'s" to handle the new work load, what is most likely to happen is that the attorney general will hire outside counsel. T.C.P.I.A. will still be represented by outside counsel and T.C.P.I.A. will still pay the attorney fees; the only practical change under Section 12A is that the elected state attorney general, not the T.C.P.I.A., gets to pick which law firm will get the business.

CONFLICTS OF INTEREST

Under Section 12A, the attorney general's office is placed in the position of representing parties with conflicting interests against one another. When the T.C.P.I.A. denies a claim, the State Board of Insurance may reverse that denial in an administrative hearing. T.C.P.I.A. has the option of appealing the decision of the State Board of Insurance to state

district court. The attorney general is already required by statute to represent the State Board of Insurance.

Section 12A makes the attorney general the legal representative of both sides for the purposes of deciding a claims dispute in state court. This places the T.C.P.I.A. in the awkward position of having a legal representative who can unilaterally settle a claim for an undesired amount, or decide not to appeal a decision of the State Board of Insurance, which it also represents. T.C.P.I.A. and its members feel that their private financial interests may be compromised if their attorney, who happens to hold a political office, is charged with representing the other side as well as the public interest at the same time.

These same conflicts arise in the context of rate hearings before the State Board of Insurance. If the T.C.P.I.A. disagrees with the rate set by the State Board, CATPOOL has the right to appeal to state district court. The attorney general again would be placed in the unsavory position of being able to settle the dispute or decline to appeal because it agrees with its other client on the other side, the State Board of Insurance, or because it is in the public interest.

The T.C.P.I.A. and its members, not the state, are the parties obligated to pay judgments, including huge liability exposure under the treble damages provision of art. 21.21 of the Texas Insurance Code. The State Board of Insurance is immune from such judgments.

Representation of the CATPOOL according to Section 12A presents conflicts of interest, even if the attorney general institutes one of the "protective measures" that it offers as a means for resolving this conflicts. Four different, potentially conflicting legal interests are all to be represented by the attorney general under Section 12A: the interest of the T.C.P.I.A., the member companies of the CATPOOL, the State

Board of Insurance, and the public interest of the citizens of Texas.

The attorney general claims that any conflict can be handled by putting up "Chinese walls" between different divisions of assistant attorney generals handling each distinct interest. This scenario would require the attorney general to set aside or acquire enough manpower to handle each distinct interest, so that each division could competently represent its particular party's interest independently of the other divisions. Only then could the imaginary barriers be erected between the assistant attorney generals within their office, barring communication among the representatives of the different interests. The attorney general also has the option of choosing a favored private firm for outside help.

Neither of the two troubleshooting options completely resolves the conflicts of interest in representation created by Section 12A. Even ignoring the fact that the T.C.P.I.A., State Board of Insurance, and the public interest may not always be aligned, the interests of T.C.P.I.A. and its member companies are not always the same.

As to the proposition that the individual member companies can hire their own counsel to represent their interests in the event that a conflict arises with the T.C.P.I.A., only the T.C.P.I.A., and not the individual member companies, are allowed to appeal a decision by the State Board of Insurance to state district court. A unilateral decision by the attorney general not to appeal to the state court in the interest of T.C.P.I.A., the State Board of Insurance, or the public interest would be harmful to the interests of a number of the small member companies that comprise the catastrophe pool.

Whether the attorney general's office decides to take on T.C.P.I.A.'s daily legal matters, or to "pork barrel" the work out to outside law firms, Plaintiffs believe that Section 12A is

depriving them of their constitutional right to spend their private funds on the attorney of their choice.

II. CONCLUSIONS OF LAW

A. STANDARD FOR PRELIMINARY INJUNCTION

Plaintiff must satisfy four criteria in order to be entitled to a preliminary injunction: (1) a substantial likelihood that the movant will prevail on the merits; (2) relative lack of harm to the respondent if relief is granted; (3) granting relief will not disserve the public interest; and (4) irreparable harm to the movant if relief is not granted. *See Enterprise International, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 471 (5th Cir. 1985); *Camenisch v. University of Texas, 616 F.2d* 127, 129 (5th Cir. 1980).

1. PLAINTIFFS' CLAIM ON THE MERITS

EQUAL PROTECTION

Plaintiffs claim that Texas Insurance Code Article 21.49, Section 12A deprives them of their right to equal protection under the law as guaranteed by the Fourteenth Amendment of the United States Constitution. The Court finds that the Plaintiffs are not likely to prevail on the merits based upon their equal protection claim.

Section 12A is an amendment to the already existing body of legislation, the Texas Catastrophe Insurance Pool Act. All of this legislation applies equally to the class of insurance companies who are licensed to write property insurance in the State of Texas. The basis for the governmental classification was to ensure the adequate provision of hail and windstorm catastrophe insurance for the Texas coastal area, which private property insurance companies were failing to provide on their own. This classification is proper given the governmental

purpose behind mandating the involuntary association of property insurance companies in the T.C.P.I.A. *See Pennell v. City of San Jose*, 458 U.S. 1 (1988). This classification treats similarly situated persons in a similar manner.

DUE PROCESS

Plaintiffs claim that Section 12A violates the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution, in that it violates their rights to be fairly and adequately represented by counsel whose duties and loyalties are owed to the interests of T.C.P.I.A. and its members. The Court finds there is a substantial likelihood that the Plaintiffs will prevail on the merits of their due process claim.

The right to retain counsel in civil litigation is implicit in the concept of Fifth Amendment due process. *Potashnick v. Port City Construction Co.*, 609 F.2d 1101, 1117 (5th Cir. 1980), *cert. denied*, 449 U.S. 820 (1980). The Fifth Circuit has explicitly recognized that a civil litigant has the right to retain hired counsel. *Id.* at 118. The right to retain hired counsel is separate and distinct from the right to appointed counsel in civil actions, which does not exist in most cases. *Id.* at 1118.

The right of a civil litigant to be represented by counsel implies a right to the lawyer of his choice. *McCuin v. Texas Power & Light Co.*, 714 F.2d 1255, 1262 (5th Cir. 1983). The right to counsel of one's choice may be overridden only when "compelling reasons exist." *Id.* at 1263.

Courts have found compelling reasons to override a litigant's choice of counsel only in limited circumstances. Counsel may not be chosen primarily for the purpose of disqualifying the judge. *McCuin v. Texas Power & Light*, 714

F.2d at 1264. Furthermore, counsel may not continue to represent two parties where beyond the individual's right to spend his own money to obtain the advice and assistance of counsel who is otherwise qualified. *Caplin & Drysdale* at 2652.

Section 12A deprives T.C.P.I.A. and its member companies of their right to spend their own money to retain the qualified legal representative of their choice. Mr. Lewis, defense counsel and assistant attorney general, argues that Section 12A was passed as a cost saving measure, based upon the rationale that legal fees would be reduced if T.C.P.I.A. and its members were deprived of the right to choose their own legal representative.

The money used to pay for the private attorneys hired by T.C.P.I.A. for the last 20 years has not come from the coffers of the state of Texas. Every dollar which has gone to pay the legal fees of T.C.P.I.A. has come out of the pockets of the member companies of the association, not of the taxpayers. T.C.P.I.A. and its members receive no state money or benefits whatsoever, with the exception of a premium tax credit for catastrophic disaster losses in amounts over $100 million.

The Legislature's concern for how the private member corporations of T.C.P.I.A. spend their private funds for legal representation of their choice is curious. The Defendant has failed to demonstrate to the Court that the "cost saving" rationale of Section 12A is sufficiently compelling to justify depriving T.C.P.I.A. and its members of their Fifth Amendment rights.

T.C.P.I.A. IS NOT A STATE AGENCY FOR PURPOSES OF 5TH AMENDMENT DUE PROCESS

The Attorney General attempts to end-run the Plaintiffs' due process rights by arguing that T.C.P.I.A. is a "state agency" or "entity" and, therefore, has no due process rights.

The mere fact that Section 12A asserts that T.C.P.I.A. is a "state agency for the purposes of employing or authorizing legal representation" does not convince the Court that the association is in fact a state agency without Fifth Amendment rights. As stated at length in the findings of fact, T.C.P.I.A. receives no public funds, and its losses are paid out of the private funds of its member companies. The member companies do not receive any profits for providing the catastrophe insurance to the 14 coastal counties. Any premiums collected in excess of losses for the year are used to purchase reinsurance.

T.C.P.I.A. receives no state money, either directly or indirectly. The fact that the Association's member companies may claim a premium tax credit for losses over and above $100 million in the event of a major disaster does not establish T.C.P.I.A. as a state agency or a public entity in the Court's opinion. The statutory scheme creating T.C.P.I.A.'s premium tax credit is similar to other statutory schemes designed to encourage business in the state: (1) Texas Tax Code § 153.123 provides a tax credit to a fuel distributor selling gasoline and alcohol mixtures; (2) Texas Tax Code § 155.184 applies a tax credit to a tobacco dealer or distributor for taxes paid on products which have become unfit for consumption or sale; (3) Texas Tax Code § 153.1195 provides a tax credit to a distributor of gasoline who has paid the taxes on a sale which later becomes an uncollectible debt; (4) Texas Tax Code § 151.426 provides a tax credit to merchants on accounts which involve bad debts, returned merchandise and repossession. Although each of these tax provisions provides for tax credits

to each of these types of businesses, none of the affected companies are considered to be state agencies or public entities by virtue of the tax credit.

Defendant stresses the fact that T.C.P.I.A. operates under a Plan of Operation which is approved by the State Board of Insurance. Defendant would have the Court believe that this fact demonstrates that T.C.P.I.A. is a state agency. Testimony during the evidentiary hearing established that T.C.P.I.A. and its members have an active input role with the formulation of the Plan, which is then put together as a rule of the State Board of Insurance. Plaintiffs persuasively point out that members of the T.C.P.I.A. have the right to appeal the rule adopted by the State Board to state court; Plaintiffs urge that no other "state agency" can appeal its own agency rule to state court, and the Defendant has failed to offer any evidence to the contrary.

Defendant argues that T.C.P.I.A. is given limited immunity and is, therefore, a state agency. This immunity suggested by the Defendant is limited to a codification of the common law regarding testimonial privileges in administrative proceedings. The T.C.P.I.A. and its member companies are not immune from judgment. As stated before, the Association and its members are subject to liability for treble damages under Section 21.21 of the Texas Insurance Code; no other "state agency" faces the huge liability exposure under Section 21.21.

Defense counsel in fact stated to this Court during the preliminary injunction hearing that T.C.P.I.A. is not a state "agency", but a state "entity." *McGregor v. Clawson*, 506 S.W.2d 922 (Tex. Civ. 4pp. - Waco) and the cases Defendant cites in his brief address state agencies, not "entities created by the state."

Defendant argues that as a state entity, the association is not entitled to due process rights because it would not exist without the "coercive power" of the state. Defendant asserts

that the deprivation of the Plaintiffs' Fifth Amendment rights is justified because the state has the power to deprive a private property insurer of its license to do business, if that private company does not associate with the catastrophe pool.

To say that the state's coercive power to grant a business license to private insurance companies makes an entity a state agency (devoid of any constitutional rights), would make every corporation in the State of Texas a state agency. Every corporation licensed to do business in the state of Texas exists only by the authority of the state; surely this could not be construed to mean that those corporations do not have the right to use their private funds to hire their chosen attorney, but must be represented by the state's attorney or a private attorney of the elected attorney general's choice.

Accordingly, the Court finds that the Plaintiffs are likely to prevail on the merits of their Fifth Amendment due process claim under the United States Constitution.

2. IRREPARABLE HARM

Plaintiffs claim that they will be irreparably harmed if the Court does not grant their Motion for Preliminary Injunction. Section 12A, which became effective on September 1, 1991, makes the attorney general the party responsible for legal representation of the T.C.P.I.A. in all matters, including the instant suit. All pending and future claims disputes, rate hearings, and daily legal business will be taken out of the hands of the Plaintiffs current attorneys and given over to the attorney general's office.

The Plaintiffs and Defendant currently have a letter agreement, Defendant's Exhibit 13, which allows the Plaintiffs to continue with their current attorneys until the Court issues its rulings in this order. Plaintiffs claim that if the Court does not grant the preliminary injunction, the letter agreement with the

attorney general will be abrogated, and all of the conflicts inherent in the legal representation of T.C.P.I.A. under Section 12A will deprive them of effective legal representation.

Having considered the testimony and evidence presented at the hearing regarding the conflicts of interest raised by Section 12A (discussed in the findings of fact), the Court finds that Plaintiffs will be irreparably harmed if relief in the form of a preliminary injunction is not granted.

3. LACK OF HARM TO RESPONDENT

Plaintiffs assert that there will be a relative lack of harm to the Defendant, the Attorney General, if the preliminary injunction is granted. Plaintiffs argue that by granting the preliminary injunction, the attorney general will be relieved of the additional caseload involved in representing the T.C.P.I.A. In addition, granting the injunction will avoid a breach of the attorney general's duty to engage in representation free of conflicts of interest.

The Defendant has offered no evidence of harm to the Attorney General if relief is granted, but only argues potential harm to the public interest, which is a separate issue in deciding the merits of Plaintiffs' motion.

The Court finds that if a preliminary injunction is granted, Defendant will experience a relative lack of harm.

4. PUBLIC INTEREST

Plaintiffs assert that if the preliminary injunction is granted, the public interest will not be disserved. Plaintiffs urge that, in fact, the public interest will be benefitted because the preliminary injunction will help ensure that the attorney general's office is acting in compliance with the Constitution,

and will avoid unnecessary expenditures incurred in taking on the representation of T.C.P.I.A.

Defendant argues that the public interest will be disserved if a preliminary injunction is granted because the Legislature's entire scheme relating to T.C.P.I.A. will be threatened. The Court finds no merit in Defendant's argument. The legislation regarding CATPOOL has been in effect since 1971 and has existed for 20 years without the provisions in Section 12A. Plaintiffs do not challenge the validity to the legislature's scheme concerning T.C.P.I.A., only the recent amendment of Section 12A. Granting a preliminary injunction restraining the enforcement of Section 12A does not threaten the entire legislative scheme to the extent that it could be considered disserving the public interest.

Accordingly, the Court finds that granting the preliminary injunction will not disserve the public interest.

B. STANDING IS PROPER

The three named plaintiffs in this action are T.C.P.I.A. and two of its member companies, Union Standard Insurance Company, and Republic Insurance Company. There is clearly standing on the part of all three plaintiffs as established by the testimony at the evidentiary hearing for the preliminary injunction. Each plaintiff has plainly alleged and shown harm traceable to the attorney general's enforcement of Section 12A. Each plaintiff has a direct pecuniary interest in the subject of this suit, and each is impacted by the conflict of interest problems under Section 12A. The litigation will clearly impact the interests of each of the Plaintiffs. *See Valley Forge Christian College v. Americans for Separation of Church and State*, 454 U.S. 464 (1982).

C. ELEVENTH AMENDMENT DOES NOT BAR THIS SUIT

Defendant cites *Pennhurst State School and Hospital v. Halderman (II)*, 465 U.S. 89 (1984) for the proposition that the Eleventh Amendment bars this suit. Defendant's reliance on this case is misplaced and this argument lacks merit. By its own terms the Eleventh Amendment bars suits by citizens of other states or foreign nationals. The amendment by implication also bars suits by citizens of the defendant state. *See Hans v. Louisiana*, 134 U.S. 1. Corporations are not citizens for the purposes of the Eleventh Amendment. *See Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 672 (1982). The Plaintiffs in this case are two corporations and T.C.P.I.A., an association of corporations. Moreover, the Eleventh Amendment does not bar action against a state official that is based on a theory that the officer acted beyond the scope of his statutory authority, or if within that authority and that authority is unconstitutional. *Id.* at 690.

Accordingly, the Court finds that the Eleventh Amendment does not bar this action.

D. POLITICAL QUESTIONS AND LEGISLATIVE MOTIVE

Defendant argues the Court should not inquire into legislative motives in making its decision and must presume that the purposes of the legislature are legitimate. Defendant also argues that the Court should dismiss this case in its entirety because it "involves a political question (the status of Catpool under state law)."

It is irrelevant to the Court's decision whether Section 12A was pushed through the legislature in a questionable manner or was based upon some motivation other than that offered by the Defendant himself. The issue before the Court

is not the validity of the entire Catastrophe Property Insurance Pool Act or the legislature's authority to pass such legislation.

The only issue being decided at this time is whether the Court should issue a preliminary injunction restraining the Defendant from enforcing Section 12A, the recent amendment to the Texas Catastrophe Property Insurance Act, Tex. Ins. Code Article 21.49.

The Court is well aware that it is not the province of this tribunal to make policy decisions for the legislature, regardless of how ill-advised the statute in question might appear as a political decision. However, it is clearly within the authority of the Court to base its decision upon the Constitution of the United States and the applicable law.

It is the opinion of the Court that: (1) there is a substantial likelihood that Plaintiffs will prevail on the merits of their due process claim based on the Fifth and Fourteenth Amendments to the United States Constitution; (2) Plaintiffs will suffer irreparable harm if a preliminary injunction is not granted; (3) there will be a relative lack of harm to the Defendant if the preliminary injunction is granted; and (4) granting a preliminary injunction will not disserve the public interest.

In light of the foregoing findings, it is the opinion of the Court that Plaintiffs' Motion for Preliminary Injunction has merit.

ACCORDINGLY, IT IS ORDERED that the Plaintiffs' Motion for Preliminary Injunction is GRANTED. Dan Morales, individually, and in his official capacity as Attorney General of the State of Texas is hereby restrained from enforcing Section 12A of the Texas Insurance Code Article 21.49 as added by H.B. 2 of the 72nd Legislature of the State of Texas.

IT IS FURTHER ORDERED that Plaintiffs' claim based on Texas state law is DISMISSED WITHOUT PREJUDICE. The Court retains jurisdiction over and does not dismiss Plaintiffs' claims based on federal law.

IT IS FURTHER ORDERED under the terms of Fed. R. Civ. P. 65 (c) that Plaintiffs shall post bond of five thousand dollars with the registry of the Court as security for such costs and damages as may be incurred.

SIGNED AND ENTERED this 30th day of September, 1991.

/S/ James R. Nowlin
JAMES R. NOWLIN
U.S. DISTRICT JUDGE

Art 21.49. Catastrophe Property Insurance Pool Act

Sec. 1. It is hereby declared by the Legislature than an adequate market for windstorm, hail and fire insurance is necessary to the economic welfare of the State of Texas and that without such insurance the orderly growth and development of the State of Texas would be severely impeded. It is therefore the purpose of this Act to provide a method whereby adequate windstorm, hail and fire insurance may be obtained in certain designated portions of the State of Texas.

Name of Act

Sec. 2. This Act shall be known as the "Texas Catastrophe Property Insurance Pool Act."

Definitions

Sec. 3. In this Act, unless the context clearly dictate to the contrary:

(a) "Board: means the State Board of Insurance of the State of Texas.

(b) "Association" means the Texas Catastrophe Property Insurance Association as established pursuant to the provision of this Act.

(c) "Plan of Operation" means the plan for providing Texas windstorm and hail insurance in a catastrophe area and Texas fire and explosion insurance in an inadequate fire insurance area which plan has been adopted by the Board for operation by the Association pursuant to the provision of this Act, which plan may, among other things, provide for limits of liability for each structure insured, and/or the corporeal movable property located therein.

(d) "Texas Windstorm and Hail Insurance" means deductible insurance against direct loss to insurable property as a result of windstorm or hail, as such terms shall be defined and limited in policies and forms approved by the State Board of Insurance.

(e) "Texas Fire and Explosion Insurance" means insurance against direct loss to insurable property as a result of fire and explosion as such terms shall be defined and limited in policies and forms approved by the State Board of Insurance.

(f) "Insurable Property" means immovable property at fixed locations in a catastrophe area or corporeal movable property located therein (as may be designated in the plan of operation) which property is determined by the Association, pursuant to the criteria specified in the plan of operation to be in an insurable condition against windstorm, hail and/or fire and explosion as appropriate, as determined by normal underwriting standards; provided, however, that insofar as windstorm and hail insurance is concerned, any structure located within a catastrophe area, commenced on or after the 30th day following the publication of the plan of operation, not built or continuing in compliance with building specifications set forth in the plan of operation shall not be an insurable risk under this Act except as otherwise provided under this Act. A structure, or an addition thereto, which is constructed in conformity with plans and specifications that comply with the specifications set forth in the plan of operation at the time construction commences shall not be declared ineligible for windstorm and hail insurance as a result of subsequent changes in the building specification set forth in the plan of operation. When repair of damage to a structure involves replacement of items covered in the building specifications as set forth in the plan of operation, such repairs must be completed in a manner to comply with such specifications for the structure to continue within the definition of Insurable Property for windstorm and hail insurance. Nothing in this Act shall preclude special rating of individual

risks as may be provided in the plan of operation. For purposes of this Act, all structures which are located within those areas designated as units under the federal Coastal Barrier Resources Act (Public Law 97-348) [1] and for which construction has commenced on or after July 1, 1991 shall not be consider insurable property.

(g) "Net Direct Premiums" means gross direct written premiums less return premiums upon canceled contracts (irrespective of reinsurance assumed or ceded) written on property in this State as defined by the Board of Directors of the Association.

(h) "Catastrophe area" means a city or county in which it may be determined by the Board, after notice of not less than 10 days and a hearing, that windstorm and hail insurance is not reasonably available to a substantial number of owners of insurable property within such city or county, due to such insurable property being located within a city or county subject to unusually frequent and severe damage resulting from windstorms and/or hailstorms. Such designation shall be revoked by the Board if it determines, after notice of not less than 10 days and a hearing, that windstorm and hail insurance in such catastrophe areas is no longer reasonably unavailable to a substantial number of owners of insurable property within such designated city or county. If the Association shall determine that windstorm and hail insurance is no longer reasonably unavailable to a substantial number of owners of insurable property in any designated catastrophe area or areas, then the Association may request in writing the Board revoke the designation of any or all of such catastrophe areas and, after notice of not less than 10 days and a hearing, but within 30 days of such hearing, the Board shall either approve or reject

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[1] 16 U.S.C.A. § 3501 et seq.

the Association's request and shall, if such request be approved, revoke such designation or designations.

(i) "Inadequate fire Insurance Area" means a city or county which is, or is within an area, designated as a catastrophe area, as defined in Paragraph (h), above, and in which it may be determined by the board, after notice of not less than 10 days and a hearing, that fire and explosion insurance is not reasonably available to a substantial number of owners of insurable property within such city or county. Such designation shall be revoked by the Board if it determines, after 10 days' notice and a hearing, that fire and explosion insurance in such inadequate fire insurance area is no longer reasonably unavailable to a substantial number of owners of insurable property within such designated city or county. If the Association shall determine that fire and explosion insurance is no longer reasonably unavailable to a substantial number of owners of insurable property in any designated inadequate fire insurance area or areas, then the Association may request in writing that the Board revoke the designation of any or all such inadequate fire insurance areas, and, after notice of not less than 10 days and a hearing, but within 30 days of such hearing, the Board shall either approve or reject the Association's request and shall, if such request is approved, revoke such designation or designations.

(j) "Insurance" as hereinafter used in this Act shall mean the types of insurance described in Paragraphs (d) and (e) of this Section 3.

(k) "Insurers" means all property insurers authorized to transact property insurance in this State and specifically includes and make this Act applicable to county mutual companies, Lloyds and reciprocal or interinsurance exchange, but shall not include (a) farm mutual insurance companies as authorized in Chapter 16 of this Code; (b) county mutual fire insurance companies which are writing exclusively industrial fire

insurance policies as defined in Article 17.02 of the Code; and (c) any companies now operating under Chapters 12 and 13 of Title 78 of the Revised Civil Statutes of Texas, 1925, as amended, which have heretofore been repealed.

(l) "First Tier Coastal County" means:

(1) Aransas County;
(2) Brazoria County;
(3) Calhoun County;
(4) Cameron County;
(5) Chambers County;
(6) Galveston County;
(7) Jefferson County;
(8) Kenedy County;
(9) Kleberg County;
(10) Matagorda County;
(11) Nueces County;
(12) Refugio County;
(13) San Patricio County; or
(14) Willacy County.

(m) "Second Tier Coastal County" means:

(1) Bee County;
(2) Brooks County;
(3) Fort Bend County;
(4) Goliad County;
(5) Hardin County;
(6) Harris County;
(7) Hidalgo County;
(8) Jackson County;
(9) Jim Wells County;
(10) Liberty County:
(11) Live Oak County;
(12) Orange County;
(13) Victoria County; or

(14) Wharton County.

(n) "Seacoast Territory" means the area of this state composed of the first tier coastal counties and the second tier coastal counties.

Creation of the Texas Catastrophe Property Insurance Association

Sec.4. (a) The Association which is hereby created shall consist of all property insurers authorized to transact property insurance in this State, except those companies that are prevented by law from writing coverages available through the pool on a Statewide basis. Every such insurer shall be a member of the association and shall remain a member of the Association so long as the Association is in existence, as a condition of its authority to transact the business of insurance in this State. Any insurer which ceases to be a member of the Association shall remain liable on contracts of insurance entered into during its membership in the Association to the same extent and effect as if its membership in the Association had not been terminated.

(b) The organizational plan of certain types of insurers precludes such insurers from writing insurance coverage for the State of Texas, any city, political subdivision or agency of the State. When insuring property of the State of Texas, any city, political subdivision or agency of the State, the Association shall not cause such policies to be issued in such companies, nor shall such companies be included as reinsurer for any policies of insurance in this category.

Operation of the Texas Catastrophe Property Insurance Association; Association Board of Directors

Sec. 5. (a) The Association shall, pursuant to the provisions of this Act and the plan of operation, and with

respect to insurance on insurable property, have the power on behalf of its members to cause to be issued policies of insurance to applicants, to assume reinsurance from its members, and to cede reinsurance to its members and to purchase reinsurance on behalf to its members.

(b) All members of the Association shall participate in its writings, expenses, profits and losses in the proportion that the net direct premiums of such member written in this State during the preceding calendar year bears to the aggregate net direct premiums written in this State by all members of the Association, as furnished to the Association by the Board after review of annual statements, other reports and other statistics the Board shall deem necessary to provide the information herein required and which the Board is hereby authorized and empowered to obtain from any member of the Association, provided, however, that a member shall, in accordance with the plan of operation, be entitled to receive credit from similar insurance voluntarily written in the area designated by the Board and its participation in the writings in the Association shall be reduced in accordance with the provisions of the plan of operation. Each member's participation in the Association shall be determined annually in the manner provided in the plan of operation. For purposes of determining participation in the Association, two or more members having a common ownership or operating in this State under common management or control shall be treated as if they constituted a single member and also shall include the net direct premiums, as defined by this article, of any affiliated insurance company that is under such common management or control including affiliated insurance companies that are not authorized to transact property insurance in this State. Any insurer authorized to write and engage in writing any insurance, the writing of which required such insurer to be a member of the Association, who becomes authorized to engage in writing such insurance shall be come a member of the Association on the 1st day of January immediately following such authorization and the determination of such insurer's

participation in the Association shall be made as of the date of such membership in the same manner as for all other member of the Association.

(c) The plan of operation of the Association shall provide for the efficient, economical, fair, and nondiscriminatory administration of the Association. The Board by rule shall adopt the plan of operation with the advice of the board of directors of the Association. The Association may present recommended changes in the plan of operation to the Board at periodic hearings conducted by the Board for that purpose, or at hearings relating to property and casualty insurance rates. The Association must present a proposed change to the Board in writing in the manner prescribed by the Board. A change proposed by the Association does not take effect unless adopted by the Board by rule.

(d) The plan of operation must include:

(1) a plan for the equitable assessment of the members of the Association to defray losses and expenses;

(2) underwriting standards;

(3) procedures for the acceptance and cession in reinsurance;

(4) procedures for determining the amount of insurance to be provided to specific risks;

(5) time limits and procedures for processing applications for insurance; and

(6) other provisions as deemed necessary by the Board to carry out the purposes of this Act.

(e) The Board shall develop programs to improve the efficient operation of the Association, including a program designed to create incentives for insurers to write windstorm and hail insurance voluntarily to cover property located in a catastrophe area, especially property located on the barrier islands. The Board shall implement the incentive program not

later than April 1, 1992. the program shall be designed in a way that reduces the number of policies that are not written into the voluntary market in catastrophe areas by not less than 10 percent by January 1, 1993, not less than 25 percent by January 1, 1994, and not less than 40 percent by January 1, 1995, based on the number of risks underwritten by the Association on January 1, 1991. The Board shall report it results to the legislature on March 1 of each year beginning in 1993.

(f) Any interested person may petition the Board to modify the plan of operation in accordance with the Administrative Procedure and Texas Register Act (Article 6252-13a, Vernon's Texas Civil Statutes).

(g) The board of directors of the Association is responsible and accountable to the Board. The board of directors is composed of nine members as follows:

(1)five representatives of different insurers who are members of the Association who shall be elected by members a provided in the plan of operation;

(2) two representatives of the general public, nominated by the office of public insurance counsel, who, as of the date of the appointment, reside in a catastrophe area and who are policyholders, as of the date of the appointment, of the Association; and

(3) two local recording agents licensed under this Code with demonstrated experience in the Association, and whose principal office, as of the date of the appointment, are located in a catastrophe area.

(h) Members of the board of directors of the Association serve three-year staggered terms with the terms of three member expiring on the third Tuesday of March of each year. If an insurer member has been elected and served two full terms, such insurer shall provide for a reasonable rotation of persons designated by it to serve on the board.

(i) The persons appointed as provided by Subsections (g)(2) and (g)(3) of this section must be from different counties.

(j) The board of directors of the Association shall elect an executive committee consisting of a chairman, vice-chairman, and secretary-treasurer from its membership. At less one of those officers must be a member appointed under Subsection (g)(2) or Subsection (g)(3) of this section.

(k) Except for an emergency meeting of the Association or the board of directors of the Association, the Association shall notify the Board not later than the 11th day before the date of each meeting of the board of directors of the Association or a meeting of the members of the Association. Except for closed or executive sessions authorized by Section 2, Chapter 271, Acts of the 60th Legislature, Regular Session, 1967 (Article 6252-7, Vernon's Texas Civil Statutes), meetings of the board of directors of the Association and members of the Association shall be open to any member of the Board or the member's designated representative and to members of the public. Notice of meetings of the Association or board of directors of the Association shall be given as provided by Chapter 271, Acts of the 60th Legislature, Regular Session, 1967 (Article 6252-17, Vernon's Texas Civil Statutes).

(l) If an occurrence or series of occurrences within the defined catastrophe area results in insured losses in excess of $100 million in a single calendar year, the Association shall immediately notify the Board of that fact. The Board on receiving notice shall immediately notify the Governor and appropriate committees of each house of the Legislature of the amount of insured losses in excess of $100 million.

Board Orders

Sec. 5A. (a) After notice and a hearing as provided in Subsection (b) of this section, the Board may issue any orders which it considers necessary to carry out the purposes of this Act including, but not limited to, maximum rates, competitive rates, and policy forms.

(b) Before an order is adopted by the Board, it shall post notice of a hearing on the order at the Secretary of State's office in the State Capitol and shall hold a hearing to consider the proposed order. Any person may appear and testify for or against the adoption of the order.

Examination of Association

Sec. 5B. (a) The Board shall, once in each two-year period, or more often if the Board considers it necessary, examine the financial condition of the Association and its abilities to meet its liabilities, as well as its compliance with the law of this state affecting the conduct of its business. The examination shall be made by the Board, one or more examiners, or commission of an independent certified public accountant. The Board or its commissioned examiners are entitle to free access to all the books and records of the Association or agents writing business in the Association and may summon and examine under oath officers, employees, agents, and any other persons in the state relative to the affairs of the Association.

(b) A final examination report of the Association resulting from an examination under this section is a public record and available to the public at the Board's offices pursuant to the open records law, Chapter 424, Acts of the 63rd Legislature, Regular Session, 1973 (Article 6252-17a, Vernon's Texas Civil Statutes).

(c) The reasonable and actual expenses of an examination of the Association shall be paid by the Association.

Eligibility: Application

Sec. 6. (a) Any person having an insurable interest in insurable property located in an area designated by the Board shall be entitled to apply to the Association for insurance provided for under the plan of operation and for an inspection of the property under such rules and regulations, including an inspection fee, if any, as determined by the Board of Directors of the Association and approved by the State Board of Insurance. The term "insurable interest" as used in this subsection shall be deemed to include any lawful and substantial economic interest in the safety or preservation of property from loss, destruction or pecuniary damage. Application shall be made on behalf of the applicant by a Local recording Agent and shall be submitted on forms prescribed by the Association. The application shall contain a statement as to whether or not the applicant has or will submit the premium in full from personal funds, or if not, to whom a balance is or will be due.

(b) If the Association determines that the property is insurable, the Association, upon payment of the premium, shall cause to be issued a policy of insurance as may be provided in the plan for a term of one year.

In the event an agent or some other person, firm, or corporation shall fiance the payment of all or a portion of the premium and there is a balance due for the financing of such premium and such balance, or any installment thereof, is not paid within 10 days after the due date, the agent or other person, firm, or corporation to whom such balance is due may request cancellation of the insurance by returning the policy, with proof that the insured was notified of such return, or by requesting the Association to cancel such insurance by notice mailed to the insured and any others shown in the policy as

having an insurable interest in the property. Upon completion of cancellation, the Association shall refund the unearned premium, less any minimum retained premium set forth in the plan of operation, to the person, firm, or corporation to whom the unpaid balance is due. In the event an insured requests cancellation of insurance, the Association shall make refund of such unearned premium payable to the insured and the holder of an unpaid balance. The Local Recording Agent, who submitted the application, shall refund the commission on any unearned premium in the same manner.

(c) Any policy issued pursuant to the provisions of this Act may be renewed annually, upon application therefore, so long as the property continues to meet the definition of "insurable property" set forth in Section 3 of this Act.

(d) Deleted by Acts 1973, 63rd Leg., p. 10-43, ch. 406, § 4.

Inspections for windstorm and hail insurance

Sec. 6A. (a) Except as otherwise provided by this Subsection, all structures that are constructed or repaired or to which additions are made on or after January 1, 1988, to be considered insurable property for windstorm and hail insurance from the Association, must be inspected or approved by the Board for compliance with the building specifications in the plan of operation. Roofing materials satisfy the building specification in the plan of operation if those materials pass the UL Standard 997 or a comparable test certified by the Board and are installed as required by the Board to promote the wind resistance of the materials. A structure constructed, repaired, or to which additions were made before January 1, 1988, that is located in an area covered at the time by a building code recognized by the Association shall be considered an insurable property for windstorm and hail insurance from the Association without compliance with the inspection or approval

requirements of this Section or the plan of operation. A structure constructed, repaired, or to which additions were made before January 1, 1988, that is located in an area not covered by a building code recognized by the Association shall be considered an insurance property for windstorm and hail insurance from the Association without compliance with the inspection or approval requirement of this Section or the plan of operation if that structure has been previously insured by a licensed insurance company authorized to do business in this State and the risk is in essentially the same condition as when previously insured, except for normal wear and tear, and without any structural change other than a change made according to code. Evidence of previous insurance includes a copy of a previous policy, copies of canceled checks or agent's records that show payments for previous policies, and a copy of the title to the structure or mortgage company records that show previous policies. The Board may appoint or employ qualified inspectors as defined in this Section to perform any inspections required by this Section.

(b) The Board shall issue for each structure that qualifies a certificate of compliance that is evidence of insurability of the structure by the Association.

(c) The Board may charge a reasonable inspection fee for each inspection in an amount that does not exceed 50 percent of the actual cost of the inspection exclusive of training and general administrative costs. The fee shall be paid before a certificate of compliance may be issued.

(d) A "qualified inspector" includes a person determined by the board to be qualified to perform building inspections because of training or experience. A qualified inspector must be approved and appointed or employed by the Board to perform building inspections. The Board may change a reasonable fee not to exceed $200 for the filing of applications

and determining the qualifications of persons for appointment as qualified inspectors.

(e) The Board shall promulgate rules and forms to effect the provisions of this Section under the Administrative Procedure and Texas Register Act (Article 6252-13a, Vernon's Texas Civil Statutes). In promulgating those rules, the Board should consider the following:

(1) insuring that inspections conducted by the Board are done within 48 hours of the time an inspection request is made;

(2) providing periodic inspections to allow building to proceed without stopping to await inspections;

(3) allowing inspections to be coordinated, when possible, with inspections by other governmental subdivisions;

(4) allowing continued construction if an inspection is not made in a timely manner with minimum disturbance of a structure for subsequent inspections;

(5) providing inspection standards including;

(A) the number of inspections; and

(B) the items to be inspected for compliance with the building specifications set forth in the plan of operation; and

(6) furthering knowledge and understanding of the building specifications through education programs for builders, contractors, and other appropriate persons.

(f) The Board shall appoint an advisory committee to advise and make recommendations to the Board on building specifications in the plan of operation. The advisory committee should be composed of at least one representative of the

Association, a representative of the residential building industry in the catastrophe area, a representative of municipal building officials in the catastrophe area, a registered professional engineer who is a resident of the catastrophe area with knowledge of building codes, a representative of the Board, a county commissioner or county judge, and other persons as may be deemed appropriate by the Board. Before the adoption of a change in the building specifications in the plan of operation, the Board shall give the members of the advisory committee notice required by Section 5, Administrative Procedure and Texas Register Act (Article 6252-13a Vernon's Texas Civil Statutes).

(g) The Board may make agreements and contracts as necessary to effect the provisions of this Section.

(h) The Board may charge a reasonable fee to cover the cost of making building specifications and inspection standards available to the public.

(i) All fees collected by the Board under this Section shall be deposited in the State Treasury to the credit of the State Board of Insurance operating fund.

(j) After notice and hearing, the Board may cancel or revoke an appointment or authorization made, issued, or existing under this Section if the holder or possessor of the appointment or authorization if found to be in violation of, or to have failed to comply with, specific provisions of this Section or any rule or regulation of the Board made under this Section. In lieu of cancellation or revocation, the Board may order one or more of the following sanctions, if it determines from the fact that it would be fair, reasonable, or equitable:

(1) suspending the authorization or appointment for a specific period, not to exceed one year;

(2) an order directing the holder or possessor of the authorization or appointment to cease and desist from the specified activity determined to be in violation of specific provisions of the Section or rules and regulation of the board made pursuant to this Section or from failing to comply with those provisions of this Section or the rules and regulations promulgated under this Section; or

(3) if the person authorized or appointed is found by the Board to have knowingly, wilfully, fraudulently, or with gross negligence signed or caused to be prepared an inspection report that contains a false, fictitious, or fraudulent statement or entry, directing the holder or possessor of the authorization or appointment to remit within a specified time, not to exceed 60 days, a specified monetary forfeiture not exceed $5,000 for the violation or failure to comply.

(k) A monetary forfeiture paid as result of an order issued under Subsection (j)(3) of this Section shall be deposited to the credit of the general revenue fund. If it is found after hearing that any holder or possessor has failed to comply with an order issued under Subsection (j) of this section, the Board shall, unless its order is lawfully stayed, cancel the authorization or appointment of the holder or possessor. The Board may dispose of any matter under Subsection (j) of this Section by consent order or default.

Deletion of Coverages From Other Policies

Sec. 7. The Board shall prepare endorsements and forms applicable to the standard policies which it has promulgated providing for the deletion of coverages available through the Association and shall promulgate the applicable reduction of premiums and rates for the use of such endorsement and forms.

Rates, Rating Plans and Rate Rules Applicable

Sec. 8. (a) The Association shall file with the Board every manual of classifications, rules, rates which shall include condition charges, every rating plan, and every modification of any of the foregoing which it proposes to use. Every such filing shall indicate the character and the extent of the coverage contemplated and shall be accompanied by the policies and endorsements forms proposed to be used, which said forms and endorsements may be designed specifically for use by the Association and without regard to other forms filed with, approved by, or promulgated by the Board for use in this State. The Association may not file changes that would result in a reduction of coverages or an increase in an applicable deductible.

(b) Repealed by Acts 1991, 72nd Leg., ch.242, § 12.07(7), eff. Sept. 1, 1991.

(c) Any filing made by the Association pursuant hereto shall be submitted to the Board and as soon as reasonably possible after the filing has been made the Board shall, in writing, approve, modify, or disapprove the same; provided that any filing shall be determined approved unless modified or disapproved within 30 days after date of filing.

(d) If at any time the Board finds that a filing so approved no longer meets the requirements of this Act, it may, after a hearing held on not less than 20 days' notice to the Association specifying the matters to be considered at such hearing, issue an order withdrawing its approval thereof. Said order shall specify in what respects the Board finds that such filing no longer meets the requirements of this Act and shall be effective not less than 30 days after its issuance.

(e) All rates shall be made in accordance with the following provisions:

(1) Due consideration shall be given to the past and prospective loss experience within and outside the State of hazards for which insurance is made available through the plan of operation, if any, to expenses of operation including acquisition costs, to a reasonable margin for profit and contingencies, and to all other relevant factors, within and outside the State.

(2) Risks may be grouped by classifications for the establishment of rates and minimum premiums. Classification rates may be modified to produce rates for individual risks in accordance with rating plans which establish standards for measuring variations in such risks on the basis of any or all of the factors mentioned in the preceding paragraph. Such rates may include rules for classification of risks insured hereunder and rate modifications thereof. All such provisions, however, as respects rates, classifications, standards and premiums shall be without prejudice to or prohibition of provision by the Association for consent rates on individual risks if the rate and risk are acceptable to the Association and as is similarly provided for, or as is provided for, in Article 5.26(a), Texas Insurance Code, and this provision or exception on consent rates is irrespective of whether or not any such risk would otherwise be subject to or the subject of a provision of rate classification or eligibility.

(3) Rates shall be reasonable, adequate, not unfairly discriminatory, and nonconfiscatory as to any class of insurer.

(4) Commissions paid to agents shall be reasonable, adequate, not unfairly discriminatory and nonconfiscatory.

(f) For the purpose of this Act the applicant under Section 6(a) hereof shall be considered to have consented to the appropriate rates and classifications authorized by this Act irrespective of any and all other rates or classifications.

(g) All premiums written and losses paid under this Act as appropriate shall be included in applicable classifications for general rate making purposes.

(h) Rates, including extended coverage rates covering risks or classes or risks written by the Association before December 31, 1995, may not exceed the benchmark rates promulgated by the Board under Subchapter M, Chapter 5, Insurance Code, for noncommercial lines of insurance. Rates for noncommercial lines of insurance written by the Association on or after December 31, 1995, may not exceed the manual rate promulgated by the Board under Subchapter C, Chapter 5, Insurance Code[2]. Notwithstanding Article 5.13-2, Insurance Code, the Board shall promulgate a manual rate for commercial risks and classes of risks written by the Association in accordance with Subchapter C, Chapter 5, Insurance Code. Article 5.13-2, Insurance Code, does not apply to the rates of insurance written by the Association.

If valid flood or rising water insurance coverage exists and is maintained on any risk being insured in the pool the State Board of Insurance may provide for a rate and reduction in rate of premium as may be appropriate.

The State Board of Insurance shall make provision by rule and regulation requiring catastrophe reserves as part of the premium received on risks or classes or risks located in a catastrophe area and shall approve a catastrophe reinsurance pool or program that is funded through the excess of premiums over losses in a calendar year and may approve a catastrophe reinsurance pool funded through assessments of members of the Association. The amount required to be reserved for catastrophe (as such catastrophes are defined by the Board) shall be that portion of the pure premium as is actuarially made

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[2]Art. 5.25 et seq.

attributable, as ascertained by the Board, to prospective catastrophic loss. The portion of the pure premium attributable to prospective catastrophic loss shall not be income and shall be unearned until the occurrence of an applicable catastrophe as defined and shall be held in trust by the pool or trustee of the pool until losses are paid therefrom under such reasonable rules and regulations as the State Board of Insurance shall prescribe or approve.

(i) The Board annually shall promulgate extended coverage rates based on sound actuarial principles. Rates for windstorm and hail insurance shall be 90 percent of the extended coverage rates. Extended coverage rates shall be uniform throughout the first tier coastal counties. The catastrophe element of extended coverage rates shall be uniform throughout the seacoast territory and shall be based on all monoline extended coverage loss experience of all regulated insurers authorized to do business in this state, including the Association, for property located in the seacoast territory, using the most recent 30 years' experience available. Surcharges collected in the past and used in the development of current manual rates may not be excluded from future rate development as long as those surcharges were collected during the experience period used by the Board.

Replacement cost coverage

Sec. 8A. (a) A policy of windstorm and hail insurance issued by the Association may include replacement cost coverage for one and two-family dwellings, as that term is defined in the General Basis Schedule, subject to any applicable deductibles and the limits for the coverage purchased by the insured. The replacement cost coverage does not apply to outdoor antennas, aerials, carpeting, awnings, appliances, or other outdoor equipment, whether or not attached to the insured dwelling.

(b) If, at the time of loss, the total amount of insurance applicable to the dwelling is equal to 80 percent or more of the full replacement cost of the dwelling or equal to the maximum amount of insurance otherwise available through the Association, coverage applicable to the dwelling under the policy is extended to include the full cost of repair or replacement, without a deduction for depreciation. If, at the time of loss, the total amount of insurance applicable to the dwelling is equal to less than 80 percent of the full replacement costs of the dwelling and less than the maximum amount of insurance available through the Association, liability for loss under the policy may not exceed the replacement cost of that part of the dwelling damaged or destroyed, less depreciation.

(c) The Board may promulgate such rules and regulations as necessary to implement this section.

Liability limits

Sec. 8D. (a) A policy of windstorm and hail insurance issued by the Association under this Act shall provide coverage for any one insurable property in amounts equal to:

(1) $250,000 for a dwelling and the corporeal movable property located in the dwelling, as the term "dwelling" is defined in the special dwelling, homeowners, or farm and ranch property owners schedules of the General Basis Schedule;

(2) $2 million for a building and the corporeal movable property located in the building that is owned by, and at least 75 percent of which is occupied by, a governmental entity, or that is not owned by, but is wholly and exclusively occupied by, a governmental entity;

(3) $750,000 per building for an apartment, condominium, or townhouse defined as a risk under the apartment house rating schedule, residential condominium rating

schedule, or townhouse unit rating schedule of the General Basis Schedule and the corporeal movable property of the owner of the structure in which the apartment, condominium, or townhouse is located;

(4) $100,000 for individually owned corporeal movable property located in an apartment, condominium, or townhouse unit that is occupied by the owner of that property; and

(5 $1 million for a structure other than a dwelling or a public building and the corporeal movable property located in that structure.

(b) Liability limits for insurable property that is not covered under Subsection (a) of this section shall be established by the plan of operation.

(c) The Board, as part of the annual rate hearings conducted by the Board, shall adjust the liability limits for inflation, including the limits set by Subsection (a) of this section, at a rate that reflects any change in the BOECK Index or other index that may accurately reflect changes in the cost of construction or residential values in the catastrophe area. The indexing of the limits of liability shall apply as determined by the Board on and after January 1, 1992.

(d) Notwithstanding Subsections (b) and (c) of this section, the Board may not adjust liability limits to amounts lower than the amounts adopted under Subsection (a) of this section.

(e) A policy holder who is insured on September 1, 1991, for an amount higher than the liability limits prescribed by Subsection (a) of this section may not be required to reduce the insurance coverage to an amount lower than the amount in effect on September 1, 1991.

Reinsurance study

Sec. 8E. (a) The Board shall conduct a study relating to reinsurance coverage for windstorm and hail insurance. Through the study, the Board shall determine methods to ensure that reinsurance is available on a statewide basis and may develop other recommendations relating to the efficient provision or reinsurance coverage regarding property and other risks insurance through the Association.

(b) The Board shall report the results of the study to the 73rd Legislature not later than March 1, 1993.

(c) This section expires March 2, 1993.

Appeals

Sec. 9. Any person insured pursuant to this Act, or his duly authorized representative, or any affected insurer who may be aggrieved by an act, ruling or decision of the Association, may, within 30 days after such act, ruling or decision, appeal to the commissioner. In the event the Association is aggrieved by the action of the commissioner with respect to any ruling, order, or determination of the commissioner, it may, within 30 days after such action, make a written request to the commissioner, for a hearing thereon. The commissioner shall hear the Association, or the appeal from an act, ruling or decision of the Association, within 30 days after receipt of such request or appeal and shall give not less than 10 days' written notice of the time and place of hearing to the Association making such request or the person, or his duly authorized representative, appealing from the act, ruling or decision of the Association. A hearing on an act, ruling or decision of the Association relating to the payment of, the amount of, or the denial of a particular claim shall be held, at the request of the claimant, in either the county in which the covered property is located or Travis County. Within 30 days after the hearing, the

commissioner shall affirm, reverse or modify its previous action or the act, ruling or decision appealed to the commissioner. Pending such hearing and decision thereon, the commissioner may suspend or postpone the effective date of its previous rule or of the act, ruling or decision appealed to the commissioner. The Association, or the person aggrieved by any order or decision of the commissioner, may thereafter appeal to either a District Court of Travis County, Texas, or a District Court in the county in which the covered property is located. An action brought under this section is subject to the procedures established under Article 1.04(f) of this code.

Disputes Relating to Claims

Sec. 9A. (a) Any person insured under this Act who is aggrieved by an act, ruling, or decision of the Association relating to the payment of, the amount of, or the denial or a claim may elect to bring an action, including an action under Article 21.21 of this code, against the Association in a court of competent jurisdiction or to appeal the act, ruling, or decision under Section 9 of this Article. A person may not proceed under both Section 9 of this Article and this section for the same act, ruling, or decision.

(b) Except as otherwise provided by this subsection, venue in a proceeding action against the Association under this section, including an action under Article 21.21 of this code, is in the county in which the covered property is located or in a District Court of Travis County. Venue is only in the District Court of Travis County if the claimant joins the State Board of Insurance as a party to the action.

Immunity From Liability

Sec. 10. There shall be no liability on the part of and no cause of action of any nature shall arise against the Board or any of its staff, the Association or its agents or employees, or

against any participating insurer or its agents or employees, for any inspections made under the plan of operation or any statements made in good faith by them in any reports or communications concerning risks submitted to the Association, or at any administrative hearings conducted in connection therewith under the provisions of this Act.

Indemnification

Sec. 11. Each person serving as a director of the Association, each member of the Association, and each officer and employee of the Association shall be indemnified by the Association against all costs and expenses actually and necessarily incurred by him or it in connection with the defense of any action, suit, or proceeding in which he or it is made a party by reason of his or its being or having been a director or member of the Association, or an officer or employee of the Association except in relation to matters as to which he or it has been judged in such action, suit or proceeding to be liable by reason of misconduct in the performance of his or its duties as a director of the Association or a member or officer or employee of the Association, provided, however, that this indemnification shall in no way indemnify a member of the Association from participating in the writings, expenses, profits, and losses of the Association in the manner set out in this Act. Indemnification hereunder shall not be exclusive of other rights to which such member or officer may be entitled as a matter of law.

Annual Report

Sec. 12. The Association shall file in the office of the Board annually a statement which shall summarize the transactions, conditions, operations and affairs of the Association during the preceding year at such times and covering such periods as may be designated by the Board. Such statement shall contain such matters and information as

are prescribed by the Board and shall be in such form as is required by it.

Legal Counsel

Sec. 12A. The association is a state agency for purposes of employing or authorizing legal representation and shall be represented by the attorney general in the manner provided by general law for representation of any other state agency by the attorney general.

Effective Date

Sec. 13. This Act shall become effective from and after passage.

Conflicting Laws

Sec. 14. All laws or parts of laws in conflict herewith are hereby repealed to the extent necessary to accomplish the purposes of this Act.

Partial Invalidity

Sec. 15. If any provision of this act or the application thereof to any person or circumstance is held to be invalid, such invalidity shall not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

Sec. 16. [Emergency provision].

Codification

Sec. 17. This Act is hereby codified as Article 21.49 of the Texas Insurance Code.

Application of Act

Sec. 18. This Act does not apply to farm mutual insurance companies, as defined in Article 16.01 of the Insurance Code, nor does it apply to any exiting company chartered under old Chapter 12, Title 78, Revised Civil Statutes of Texas, 1925, repealed by Chapter 40, Acts of the 41st Legislature, 1st Called Session, 1929, Chapter 40.

Payment of Losses Exceeding $100 Million in Year; Premium Tax Credit

Sec. 19. In the event any occurrence or series of occurrences within the defined catastrophe area results in insured losses of the association totaling in excess of $100 million within a single calendar year, the proportion of the total loss allocable to each insurer shall be determined in the same manner as its participation in the association has been determined for the year under Subsection (c) of Section 5 of the Texas Catastrophe Insurance Pool Act, as amended, and any insurer which has paid its share total losses exceeding $100 million in a calendar year shall be entitled to credit the amount of that excess share against its premium tax under Article 7064, Revised Civil Statutes of Texas, 1925, as amended.[3] The tax credit herein authorized shall be allowed at a rate not to exceed 20 percent per year for five or more successive years following the year of payment of the claims. The balance of payments paid by the insurer and not claimed as such tax credit may be reflected in the books and records of the insurer as an admitted asset of the insurer for all purposes, including exhibition in annual statement pursuant to Article 6.12 of this Insurance Code.

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[3]Transferred; see, now, art. 4.10 of this Code.

Supreme Court, U.S.
MAR 12 1993
OFFICE OF THE CLERK

No. 92-1278

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DAN MORALES, Individually and in his official capacity as Attorney General of the State of Texas,

Petitioner,

v.

TEXAS CATASTROPHE PROPERTY INSURANCE ASSOCIATION, UNION STANDARD INSURANCE COMPANY, and HIGHLANDS INSURANCE COMPANY,

Respondents.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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March 12, 1993

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QUESTION PRESENTED

May a state constitutionally legislate that an involuntary association of private insurers is required to accept and employ the Attorney General of the state as its legal counsel?

LIST OF PARTIES AND AFFILIATED CORPORATIONS

1.0 Respondents

1.1 Texas Catastrophe Property Insurance Association ("Catpool").

1.2 Union Standard Insurance Company ("Union Standard")
Parent: W.R. Berkley Corporation
Subsidiary: Brookhollow Insurance Agency

1.3 Highlands Insurance Company ("Highlands")
Parent: Highlands Group Insurance, Inc.
Parent: Halliburton Company
Subsidiaries: Highlands Overseas Limited
Highlands Limited
Southern California Bonding Service, Inc.
Underwriters Special Risks, Inc.
Subsidiaries: Highlands Underwriters Insurance Company
Highlands Casualty Company
Aberdeen Insurance Company
Halliburton Holdings, Inc.
Halliburton Holdings, Ltd.
Highlands Insurance Company (U.K.),Ltd.
Highlands Underwriting Agents, Ltd.

2.0 Petitioner

Dan Morales, Individually and in his official capacity as Attorney General of the State of Texas.

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Tex. Ins. Code Ann. art. 21.49, § 5 (Vernon Supp. 1993). 2

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No. 92-1278

IN THE

Supreme Court of the United States

October Term, 1992

DAN MORALES, Individually and in his official capacity as Attorney General of the State of Texas,
Petitioner,

v.

TEXAS CATASTROPHE PROPERTY INSURANCE ASSOCIATION, UNION STANDARD INSURANCE COMPANY, and HIGHLANDS INSURANCE COMPANY,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, Texas Catastrophe Property Insurance Association ("Catpool"), Union Standard Insurance Company ("Union Standard"), and Highlands Insurance Company ("Highlands"), respectfully request that this Court deny the petition for writ of certiorari seeking review of the Fifth Circuit's judgment in this case. The opinion of the Fifth Circuit is reported at 975 F.2d 1178.

STATEMENT OF THE CASE

In its statement of the case, Petitioner omits a number of crucial facts about Catpool. Respondents therefore submit the following brief statement of their own.

The Texas Catastrophe Property Insurance Association ("Catpool") was created in 1971 for the purpose of providing property insurance in high-risk areas of the state where an adequate private insurance market was unavailable. Tex. Ins. Code Ann. art. 21.49, §§ 1, 4(a) (Vernon 1981). It is an involuntary association of all property insurers in Texas, and is held together by the requirement that insurers remain members as a condition of their authority to transact business within the state. *Id.* But for this requirement, the Catpool would have no members, since membership in Catpool is not in the economic best interest of insurers (Tr. 39, 41, 61).

The Catpool, unlike an assigned risk pool, writes its own policies of insurance (Tr. 25-26) and pays its own claims (Tr. 26). Operating expenses and funds to pay losses come first from premiums collected, and then from assessments collected from members. Tex. Ins. Code Ann. art. 21.49, § 5 (Vernon Supp. 1993). Contrary to Petitioner's assertion, these assessments are set by Catpool's Board of Directors, and not by the State Board of Insurance. (Tr. 39-40); Tex. Ins. Code Ann. art 21.49, § 5(d) (Vernon Supp. 1993). Catpool receives no state funds and its employees receive no state salaries or benefits (Tr. 33). It receives no exemption from state sales taxes (Tr. 34) or premium taxes upon the policies it writes (D.Ex. 2). Under an Internal Revenue Service ruling, it files federal tax returns as a partnership and not as a state agency (Tr. 47). Losses of the Catpool are assessed against the member companies in proportion to their market share of property insurance writings, with consideration given to their voluntary writings which would otherwise be written by Catpool. Tex. Ins. Code Ann. art. 21.49, § 5(b) (Vernon Supp. 1993). Any profit of the association (although largely theoretical) would be apportioned between the members in the same way. *Id.* Realistically though, potential liability on Catpool policies

exceeds premium receipts by billions of dollars (Tr. 27), and represents the biggest exposure borne by many of Catpool's members (Tr. 53).

The Catpool has not been endowed with any of the state's powers. It does not make rules to be applied to others, it has no power to enforce rules, and it holds no hearings to determine the rights of others. See, Tex. Ins. Code Ann. art. 21.49 (Vernon 1981 and Vernon Supp. 1993). It is solely in the business of writing insurance policies. The Catpool is heavily regulated and overseen in this endeavor both by the Act creating it, and by the Texas Department of Insurance and State Board of Insurance, which are state agencies created for the purpose of regulating the business of insurance in Texas. Tex. Ins. Code Ann. arts. 1.01A, 1.02 (Vernon Supp. 1993). The Catpool has the right to appeal orders of those agencies which it deems to adversely affect it. Tex. Ins. Code Ann. art. 21.49, § 9 (Vernon Supp. 1993).

Effective September 1, 1991, the Texas Catastrophe Property Insurance Pool Act was amended to require Catpool to be represented by the Attorney General of Texas. Tex. Ins. Code Ann. art. 21.49, § 12A (Vernon Supp. 1993). Conspicuously, the change in Catpool's governing act did not make that association a state agency for all purposes. To the contrary, the declaration of sovereignty was limited solely to the purpose of legal representation.

Respondents filed suit shortly thereafter complaining that the amendment deprived them of their constitutional right to retained counsel of their choice in civil matters. This proceeding arises out of the district court's ruling granting Respondents' request for a preliminary injunction and restraining the Petitioner from assuming legal representation of the Catpool pending final resolution of its suit. The Fifth Circuit affirmed the decision of the district

court that Catpool and its members had shown a substantial likelihood of success on the merits,[1] and the Attorney General then filed its petition with this Court.

REASONS WHY THE PETITION SHOULD BE DENIED

A. The Fifth Circuit's Analysis and Decision in This Case are Correct.

The Fifth Circuit correctly held that the Constitution of the United States and the due process principles embodied therein guarantee to private citizens the right to retain hired counsel in civil matters (Opinion of Fifth Circuit at pp. 1180-81), citing a number of cases including a prior decision of this Court.[2] It further held that the right is not absolute, and may be overridden by a state if that state can show "compelling reasons" therefor. (Opinion of Fifth Circuit at p. 1181). However, the Attorney General did not offer any such compelling reasons and the Fifth Circuit expressly so found. The Fifth Circuit also held, in keeping with well established principles of law, that a state agency has no

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[1] The Fifth Circuit correctly stated in its opinion that the district court's rulings on the other three issues ordinarily involved in a preliminary injunction hearing; i.e. a substantial threat of irreparable injury, relative lack of harm to the opponent, and the public interest; were not disputed by the Attorney General and were properly resolved by the district court. (Opinion of the Fifth Circuit at p. 1180).

[2] *See, e.g., Powell v. Alabama*, 287 U.S. 45, 69, 53 S.Ct. 55, 64, 77 L.Ed. 158 (1932); *McCuin v. Texas Power & Light Co.*, 714 F.2d 1255, 1262-65 (5th Cir. 1983); *Mosley v. St. Louis Sw. Ry.*, 634 F.2d 942, 945-46 (5th Cir. Unit A Jan. 1981), *cert. denied*, 452 U.S. 906, 101 S.Ct. 3032, 69 L.Ed.2d 407 (1981); *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1117 (5th Cir.), *cert. denied*, 449 U.S. 820, 101 S.Ct. 78, 66 L.Ed.2d 22 (1980); *accord, Gray v. New England Tel. & Tel. Co.*, 792 F.2d 251, 257 (1st Cir. 1986).

constitutional rights to assert against the state of which it is a part, citing *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 629-30, 4 L.Ed. 629 (1819); and *Board of Levee Comm'rs of the Orleans Levee Board v. Huls*, 852 F.2d 140, 143 (5th Cir. 1988).

None of these principles of law is in dispute. Rather, it is their application to the Catpool which is the central issue in this case. As stated by the Fifth Circuit, the relevant inquiry is one of identity. If Catpool is a part of the state, as posited by the Petitioner, then it may not assert the due process right to retain hired counsel against the State of Texas. However, if Catpool is not a part of the state, but rather an association of private citizens, then Texas may not constitutionally legislate that it is required to accept and employ the Attorney General of the state as its legal counsel, and Section 12A of Article 21.49 is unenforceable. The District Court held that Catpool was not a part of Texas' state government and the Fifth Circuit affirmed its decision. These actions were correct and do not require reconsideration by this Court.

Petitioner argues that Catpool is a part of the state or is a "state entity" because its exists solely by virtue of the state's coercive power, and analogizes Catpool to the State Bar's Grievance Committee, citing *McGregor v. Clawson*, 506 S.W.2d 922, 929 (Tex. Civ. App.--Waco 1984, *original proceeding*). The district court quickly disposed of this argument in its Order (p. 17), and the Fifth Circuit apparently saw no reason even to discuss it.

The simple fact is that every corporation in the United States exists because of the coercive power of some state, and each such corporation may have its charter revoked if it fails to comply with the requirements of its creator-state. The coercive power of which the Petitioner speaks is simply

the power of government to regulate, and to enforce its regulations. By exercising that power, a state does not convert an otherwise private organization into a state agency without constitutional rights. More than that is necessary to create a state agency.

The Fifth Circuit has aptly stated the crucial difference in its opinion in this case:

> State government, as it may be conceived for our present purposes, is a great compendium of powers. It may make laws governing a vast array of activities, as is evidenced by the shelves filled with state statutes on myriad subjects. Sometimes, for the sake of convenience, a state will squeeze off some of this power to a political subdivision that it has created, such as a municipality or a levee board. Then that smaller state entity--that "political subdivision" or "auxiliar[y]" or "arm" of the state--takes charge of the function assigned to it and exercises the power delegated to it.

(Opinion of the Fifth Circuit at p. 1182, citing *City of Trenton v. New Jersey*, 262 U.S. 182, 185, 43 S.Ct. 534, 536, 67 L.Ed. 937 (1923); *Town of Mount Pleasant v. Beckwith*, 100 U.S. 514, 524, 25 L.Ed. 699 (1880); and *City of Pawhuska v. Pawhuska Oil & Gas Co.*, 250 U.S. 394, 398, 39 S.Ct. 526, 528, 63 L.Ed. 1054 (1919)).

It is this delegation of state power to the organization that distinguishes Catpool from the State Bar and its Grievance Committee, and the case of *McGregor*. The State Bar and its Grievance Committee have been entrusted with the regulation of lawyers and the hearing of complaints regarding lawyers' conduct. Those entities administer the law with

regard to lawyers and they do not practice law as do their members. In contrast, Catpool does not regulate or exercise contested case powers over insurance companies, and it does insure against property loss, just as do its members. Its power to write insurance contracts is not delegated to it by the state, but comes from the financial strength of its members. The Attorney General's Office itself has historically expressed this same opinion:

> The Association [Catpool] is a statutorily mandated association of private insurance companies. It operates on assessment fees collected from its member insurance companies; it receives no funds from the state. . . The association in no manner acts with the sanction of the state . . .

Tex. Atty. Gen. Op. JM-67 (1983). No significant changes have been made in the manner of funding or operating Catpool since the Attorney General rendered this opinion. The only explanation for the Attorney General's retreat from this position is the addition to the Catpool statute of Section 12A.

Assuming for the sake of argument that the State of Texas, acting as a sovereign and exercising its powers as such, could become a property insurer, contracting with private citizens, collecting premiums, and paying claims, to do so it would have to dedicate state resources, state personnel and state funds to its operation. Such an organization would truly be a part of the state--as the state's agent, its financial interests would be synonymous with the financial interests of the state, and it would appropriately be represented by the Attorney General. The Fifth Circuit imagined such an agency and pointed to the key difference between it and Catpool--the funds.

As set out in the Statement of the Case, above, Catpool operates with private money. It collects premiums in exchange for services it provides and it receives no state assistance in the payment of its employees or its operating expenses. When it has an operating loss, it recoups that loss by assessing its member companies. If it made a profit, that profit would be shared among its members. Whether or not it is constitutional to impose such obligations on the property insurers of the state, the insurance companies have accepted the responsibility. They have never contested the basic framework of this legislation and do not do so in this suit. What they do contest is the State's current attempt to completely remove their right to protect their funds by fiat, providing that the Attorney General exclusively represent their interests. In this, the Legislature has gone too far.

The legal representation of Catpool directly impacts the financial well-being of its member companies, not of the state. For instance, Catpool's lawyers have historically represented them in a number of battles regarding payment of claims made by insureds. *See, e.g., Texas Catastrophe Property Ins. Ass'n v. Council of Co-Owners of Saida II Tower Condominium Ass'n*, 706 S.W.2d 644 (Tex. 1986); *Rowden v. Texas Catastrophe Prop. Ins. Ass'n*, 677 S.W.2d 83 (Tex. App.--Corpus Christi 1984, *writ ref'd n.r.e*); and *Texas Catastrophe Prop. Ins. Ass'n v. Miller*, 625 S.W.2d 343 (Tex. Civ. App.--Houston [14th Dist.] 1981, *writ dism'd*). Whether or not claims are paid, and the amounts of such payments, directly determine and define the amount of the assessments against Catpool's members in a given year. Further, Catpool is subject to civil suits and liability for unfair or deceptive insurance trade practices under Tex. Ins. Code Ann. art. 21.21 (Vernon 1981 and Vernon Supp. 1993). Treble damage awards are permitted in actions brought under that statute. *Id.* Any awards rendered against

Catpool thereunder would also have to be paid out of the private funds of the members, and not by the State of Texas.

These private financial interests of Catpool and its members are ones which the Attorney General of Texas can not adequately or legally represent by definition. Tex. Const. art. 4, § 22 (Vernon 1984); Tex. Gov't Code Ann. §§ 402.021, 402.0211, 402.0212, 402.045, and 402.055 (Vernon 1990 and Vernon Supp. 1993). It is true that Texas and the public have an interest in seeing that insurance is provided to property owners along the coast, thereby promoting development of that region, but that "public interest" is no different than society's interest in every piece of benevolent legislation ever enacted. That interest does not give the State of Texas the authority to deprive private property insurance companies of the right, guaranteed to them by the Constitution of the United States, to employ counsel of their choosing to represent their interests when and as they see fit.

Finally, Petitioner directs this Court's attention to another organization in Texas which is similar to Catpool, the Texas Workers' Compensation Insurance Facility ("TWCIF"). That entity was created by statute in 1953, and also collectively provides insurance as a condition of its members' authority to do business in Texas utilizing only private funds. It recently received the same treatment by the Legislature as did the Catpool, through an amendment to its governing statute which designated the Attorney General as its legal representative. Tex. Ins. Code Ann. art. 5.76-2, § 2.05(j) (Vernon Supp. 1993). The Attorney General would have this Court grant certiorari and decide this case in order that Texas have guidance not only as to the nature of Catpool, but as to the status of TWCIF and other similar but unnamed entities. What the Petitioner fails to mention is that when its legislation was amended, the TWCIF filed a lawsuit

virtually identical to this one in state district court, challenging the validity of the offending provisions on the same due process grounds as asserted here by the Catpool. The state court ruled that TWCIF and its members had demonstrated a probable right of recovery on the merits of their suit, and preliminarily enjoined the Attorney General from enforcing the amendment in question, on the same grounds as discussed herein. (*See*, Order, dated January 7, 1992; *Texas Workers' Compensation Insurance Facility, et al. v. Dan Morales*, Cause No. 91-17346, 200th Judicial District Court of Travis County, Texas.) Thus, the Petitioner is already receiving the guidance it desires this Court to provide with respect to TWCIF from its own state judicial system.

For all of these reasons, the district court correctly decided that Catpool and its members had demonstrated a substantial likelihood of success on the merits of their suit. The Fifth Circuit correctly analyzed and affirmed that decision. Consequently, there is nothing presented to this Court which requires its action.

B. The Fifth Circuit's Analysis and Decision are Consistent With Prior Rulings of the Supreme Court, as Well as the First Circuit's Treatment of This Issue in a Parallel Case.

The Petitioner states as a reason for granting his requested writ that the Fifth Circuit's decision is contrary to prior rulings of the Supreme Court. However, his argument seems to be that the Fifth Circuit failed to apply the principle that state agencies can not assert constitutional rights against the state to Catpool. The Fifth Circuit declined to do so for all of the reasons set forth in its opinion. It did not make any holding which undercuts the basic principle of federalism set forth in *Trustees of Dartmouth College v. Woodward*, 17

U.S. (4 Wheat) 518, 629-30, 4 L.Ed. 629, 657 (1819). Its decision is wholly consistent with that case, which applies only to a state's civil institutions, adopted for internal government who receive a grant of political power, whose funds are public property, and in whose transactions the state alone is interested. *Id.*

Its decision is further consistent with a similar case recently decided in the First Circuit. In *Medical Malpractice Joint Underwriting Ass'n v. Pfeiffer*, 832 F.2d 240 (1st Cir. 1987), the First Circuit considered a case involving a constitutional challenge by a statutory entity strikingly similar to Catpool. The State of Rhode Island argued, as does the Attorney General of Texas, that it had created the association and that the association therefore had no constitutional rights to assert and no standing to sue. The *Pfeiffer* court summarily, succinctly and appropriately disposed of the contention as follows:

> However, a state cannot conscript an entire profession into an involuntary association and thus make it an "integral component of state government" without standing to protect its interests from that government.

Id. at p.244. In a related opinion involving the same association, it was held that "...it makes no difference whether the association is voluntary or involuntary because the state cannot require members to belong and then deny them the right to collectively protect their interests." *Medical Malpractice Underwriting Ass'n v. Paradis*, 756 F.Supp. 669, 674 (D.R.I. 1991). There is no reason why this Court should deal with the present case any differently than the First Circuit dealt with the similar Rhode Island association.

CONCLUSION

The Texas Catastrophe Property Insurance Association is an involuntary association of private companies which was created and exists to fulfill the Texas Legislature's directive that the property insurance industry collectively insure against losses which might be incurred in the event of a hurricane on the Texas gulf coast, upon pain of forfeiting their licenses to do business in the state. The industry has accepted its role in this regard and has endeavored for some twenty years to carry out the edict of the State of Texas, while also trying to keep its resulting out-of-pocket losses as low as possible. The State of Texas has now attempted, through its addition of Section 12A of Article 21.49 to the Texas Insurance Code, to have its lawyer, and no other lawyer, represent the interests of the insurance industry in all matters related to the Catpool endeavor. For all of the reasons set forth above, at the Fifth Circuit, and at the district court, the Constitution of the United States protects the insurance companies from having to accept that lawyer's services.

This case presents no error for this Court to review. Its holdings are absolutely consistent with principles of federalism, prior decisions of this Court, and treatment of a similar entity in similar circumstances by the First Circuit. Therefore, this petition for writ of certiorari should be denied, and Respondents respectfully so pray.

Respectfully Submitted,

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